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REFORMULATING NATIVE TITLE IN MABO'S WAKE: ABORIGINAL SOVEREIGNTY AND RECONCILIATION IN POST-CENTENARY AUSTRALIA

Carlos Scott López[†]

I. INTRODUCTION AND RECENT CURRENT EVENTS

Few issues have spurred more vigorous debate among Australia's citizenry than Native Title and, more broadly, the roles of Native Australians.¹ Like most former colonial outposts, the settlement of the Australian continent was marked by nothing less than an invasion by a European power (Great Britain), which subsequently imposed its will on the Native Peoples living in its newly "discovered" lands. These peoples were viewed as largely uncivilized and in need of protection. Hundreds of years later the debate continues over how to reconcile the present with the past.

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1. "Native Australians" are also often called "Aborigines," though this paper prefers the former term to the latter given the racist and prejudicial undertones which still accompany "Aborigine." I look forward to the day when this is not the case; however, given the fact that the term "Aborigine" has yet to be reappropriated and fully redefined by Australia's Native Peoples, it is eschewed here.

Dramatic changes loomed on the horizon with the High Court's ruling in *Mabo v. Queensland*,² which recognized the existence of Native Title in Australia and debunked the notion of terra nullius (literally "land belonging to no one"), which had previously dominated Australian jurisprudence vis-à-vis Native lands. Heralded as "one of the most significant court decision[s] in Australia's history[,]"³ it was seen as a means for Native People to claim title over the lands that had been taken away, regain rights that previously had been denied,⁴ and help end the increasing destruction of, and "injustice[s]" against, Aboriginal culture.⁵

Others, however, were less sanguine. Indeed, nestled in *Mabo* was an "out" for the government to extinguish Native Title, reflecting the justified fears of Native and non-Native Australians alike that the chaos instigated by a true "judicial" revolution would benefit nobody—not the least of whom Native Peoples seeking a bona fide resolution of past ills. This resolution involved more than just land rights, but a sense of respect and dignity accompanying a state of true reconciliation. In the years that followed, the High Court's decision was used as a basis to legislate, litigate, arbitrate, mediate, and negotiate Native Title claims, leaving some critics to wonder if Australia would have been better off had *Mabo* never been decided. Some critics focused on the impracticality—if not impossibility—of even attempting to create a system in which the "joint" interests of

2. See 175 CLR 1.

3. PETER BUTT & ROBERT EAGLESON, *MABO: WHAT THE HIGH COURT SAID AND WHAT THE GOVERNMENT DID* 92 (1996); see also PETER BUTT & ROBERT EAGLESON, *MABO, WIK & NATIVE TITLE* (1998); see also Charles Edwards, *Australia: Accommodating Multiculturalism in Law*, in *STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING* 53 (Esin Öricü et al eds., 1996) (referring to *Mabo* as a "landmark case" leading to a raising of the "status of Aboriginal people in Australia").

4. See M. A. STEPHENSON, *MABO: A JUDICIAL REVOLUTION* (1993) [hereinafter *MABO*]; see also HENRY REYNOLDS, *ABORIGINAL SOVEREIGNTY: THREE NATIONS, ONE AUSTRALIA?* 40 n.3 (1996) [hereinafter *THREE NATIONS*]; see also NONIE SHARP, *NO ORDINARY JUDGMENT: MABO, THE MURRAY ISLANDERS' LAND CASE* (1996).

5. C. D. ROWLEY, *THE DESTRUCTION OF ABORIGINAL SOCIETY* 288 (1970). One could also argue that an injustice simply exists in the way in which Aboriginals are often associated with criminals. See Howard Sercombe, *The Face of the Criminal is Aboriginal*, in *CULTURES OF CRIME AND VIOLENCE: THE AUSTRALIAN EXPERIENCE* 76 (1995); see also Exhibit 41 (illustrating, with hindsight, the absurdity of the idea of terra nullius); see also KATHY LASTER, *LAW AS CULTURE* 153 (1997). What is most ironic is the observation that "available evidence suggests that the aborigines were among the most unwarlike folk known to history." *Id.* See also Russel Ward, *The Social Fabric*, in *THE PATTERN OF AUSTRALIAN CULTURE* 12 (1963).

Native and non-Native peoples could be fairly accommodated.⁶ Conversely, other critics felt it could be done, though they cynically viewed the government as simply caving into "mining companies, pastoralists, and international capital[,] such that Native Title in Australia would "turn out to be some kind of shell game: now you see it, now you don't."⁷ Others, finally, simply took issue with the extraordinary resources being wasted to manage and process Native Title claims, noting that Native Title needed to be determined "in a new and less costly way."⁸

The following paper addresses the problems with the way in which Native Title has been conceived in Australia through the lenses of: (a) key Australian court decisions, (b) Australian native title legislation, and (c) international legal precedents addressing aboriginal title and indigenous land rights. It is divided into five key parts. Part I, which concludes here, outlines the debate in Australia and the problems that have arisen since the High Court decided *Mabo*. Part II focuses on the history, holdings, and specific problems ensuing from the High Court's decision in *Mabo* and its predecessor, *Wik*, which have provided the locus of Native Title debates and largely explain why things have evolved as they have. Part III examines events following *Mabo* and *Wik*, focusing largely on the Native Title Act of 1993 (NTA), Native Title Amendment Act of 1998 (NTAA), and the most recent High Court decisions of *Ward*⁹ and *Wilson*¹⁰ addressing Native Title in Australia. These illustrate the extent to which *Mabo*'s critics' worst fears have come predictably to fruition. Part IV considers alternative approaches to achieving full reconciliation in particular light of the ways in which Australia's Native People view their lands, and how this contrasts with the situation of Native Peoples in other countries. Indeed, while court decisions and legislation have come down supporting the rights of the Awas Tingni (Nicaragua), Delgamuukw (Canada), Maori (New

6. See Steven Mark, *Harmonization or Homogenization? The Globalization of Law and Legal Ethics—An Australian Viewpoint*, 34 VAND. J. TRANSNAT'L L. 1173 (2001) (commenting on how globalization and civilized society necessitates legal systems which protect property and proprietary rights in standardized fashions).

7. Peter Poynton, *Mabo: Now You See It, Now You Don't!*, in 35 RACE AND CLASS 41, 55 (1994).

8. Kerry Taylor, *Land Ruling Spurs Disenchantment*, THE AGE—MELBOURNE, Aug. 9, 2002, available at <http://www.theage.com.au/articles/2002/08/08/1028157989159.html> (last visited Oct. 31, 2003).

9. *Western Australia v. Ward* (2002) HCA 28.

10. *Wilson v. Anderson* (2002) 190 ALR 313.

Zealand), Sámi (Norway), and even British Peoples (United Kingdom), these fail to address the unique issues affecting Australia's Native Peoples. This discussion concludes that the ways Australia has conceived Native Title, while firmly grounded on well-settled principles of international law, fails to account for the unique relationship which Australia's Native Peoples have with their land—and that a different approach is needed for true reconciliation. The upshot is a new approach to managing Native Title in Australia which is both firmly grounded in well-understood “tried-and-true” concepts of property law, while accurately recognizing the prerequisites for ensuring the dignity and rights of Native and non-Native Australians alike. Part V concludes that now is the time to begin openly discussing how and why current attempts at reconciliation—and recognizing Native Title in Australia—need to be reformulated in novel, albeit not necessarily unfounded ways.

II. HISTORICAL CONTEXT: *MABO* AND *WIK*

The editors of the *Cairns Post* opined that *Mabo* was a “complicated judgment on Native Title handed down by the High Court,” clarifying “some rights,” though also necessitating “cheaper and less time-consuming ways to resolve Title.”¹¹ In doing so, they succinctly summarized what had been unseen when *Mabo* was decided: that within its austere holding were the seeds of failure. In *Mabo*, the High Court held:

[T]he common law of [Australia] recognizes a form of native title which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands and that . . . in accordance with their laws or customs [the land] is preserved, as native title, under the law . . .¹²

In fact, before *Mabo* Native Peoples had been negotiating one-on-one with various state and territory governments (STGs) in attempts to determine what lands, if any, they could lay claim to.¹³ *Mabo's*

11. *Complex Judgment*, THE CAIRNS POST, Aug. 9, 2002, at 11.

12. *Mabo v. Queensland* [No 2] (1992) 175 CLR 15.

13. See National Archives of Australia, available at http://www.foundingdocs.gov.au/text_only/explore/picture_album/cth_pics.htm (depicting a pictographic history of the key events leading up to *Mabo* in Native People's fight for Native Title in Australia) (last visited Nov. 29, 2003); see also Photo, available at http://www.foundingdocs.gov.au/explore/picture_album/cth_pics/i_cth_72_1971.jpg (illustrating Yolungu

"promise" was that inconsistencies among states would be resolved; however, it did not necessarily lay a clear groundwork for doing so, except through further litigation and potential legislation. It was not long before *Mabo's* promise was arguably "broken" and Native Title "had not delivered a new relationship"¹⁴ to Australia's Native Peoples.

There is no doubt that *Mabo*, and to a lesser extent its successor, *Wik*, altered the basis of Australian land law and distanced Australia from its British origins. The cases did not, however, accord equal recognition to indigenous property rights on par with other rights, such as the right to equal suffrage. Moreover, the cases never recognized Indigenous Sovereignty, which Nehal Bhuta has argued is an essential prerequisite of banishing "the shadowy, ghostlike survival" of feudal doctrines in Australian land law.¹⁵ By more closely examining the historical context and key holdings of these two cases, one can see more clearly why this is the current state of affairs. One can also more readily understand why subsequent legislation and High Court decisions have been unsuccessful in resolving the inherent difficulties which have resulted and, in essence, have wrested themselves free of their own self-imposed constraints.

A. Historical Context & Key Holdings

Understanding the limitations of *Mabo* and *Wik* requires that one first understand the context from which they stemmed. As early as 1982, Native Peoples began pursuing their right to land in Australia's courts, largely under the aegis of the Aboriginal Land Fund Commission, which had been granted Parliamentary authority to

plaintiffs from Yirrkala at the ACT Supreme Court in Sept. 1970) (last visited Nov. 29, 2003); see also Photo, available at http://www.foundingdocs.gov.au/explore/picture_album/cth_pics/i_cth18_72_1992a.jpg (illustrating Eddie Mabo at home on the island of Mer in the Torres Strait during the *Mabo* (No. 2) proceedings at the High Court, 1992) (last visited Nov. 29, 2003); see also Photo, available at http://www.foundingdocs.gov.au/explore/picture_album/cth_pics/i_cth15_72_1974b.jpg (illustrating tent embassy set up by Aboriginal Peoples on the lawns in front of Parliament House during Australia Day celebration, 1972, twenty years before the *Mabo* decision) (last visited Nov. 29, 2003); see also Photo, available at http://www.foundingdocs.gov.au/explore/picture_album/nt_pics/i_nt_72_1984Uluru.jpg (illustrating Pitjantjatjara dancers at the "hadnback" of Uluru to the Mutijulu, 1984) (last visited Nov. 29, 2003).

14. *Native Title and the Treaty Dialogue*, Sept. 26, 2002, at <http://www.ila.org.au/news/HREOC%20Native%20Title%20and%20the%20Treaty%20Dialogue.PDF> (last visited Nov. 13, 2003).

15. Nehal Bhuta, *Mabo, Wik and the Art of Paradigm Management*, 22 MELB. U. L. REV. 24, 27 (1998).

purchase Crown leases for the use of Native Peoples with the assent of STGs. In 1982, Queensland¹⁶ denied a land request by the Koowarta People and others in the Winychanam Group because "sufficient land in Queensland is *already* reserved and available for the use and benefit of the Aborigines."¹⁷ The Koowarta sued¹⁸ on the grounds that the denial was inconsistent with the Racial Discrimination Act of 1975 (RDA). In essence, the denial was based on a racial distinction, which the Act sought to prevent.¹⁹ Absent a bill of rights,²⁰ the RDA was key to the Koowarta People's claim, and the Court upheld the RDA's use by a vote of 4-3. The court reasoned it was within Parliament's authority under the Constitution's

16. Queensland plays prominently as a defendant in a large number of Native Title cases, partly resulting from the significant amount of potential Native Title land under its vast jurisdiction and its resulting conservative, xenophobic politics. See Exhibit 1, *noted in* the Appendix (illustrating the success of the expressly xenophobic One Nation Party in the most recent Australian Federal Election on Nov. 10, 2001). See also Australia Surveying and Land Information Group, *available at* <http://www.askasia.org/image/maps/austral.htm> (illustrating the comparatively large size of Queensland) (last visited Dec. 1, 2003) [hereinafter Australia Surveying].

17. *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 187 (emphasis added).

18. *Id.*

19. At issue were §§ 9 and 12 of the Racial Discrimination Act of 1975, which read:

§ 9. Racial Discrimination to be Unlawful. (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

....

§ 12. Land, Housing and other Accommodation. (1) It is unlawful for a person, whether as a principal or agent: (a) to refuse or fail to dispose of any estate or interest in land, or any residential or business accommodation, to a second person; . . . by reason of the race, colour or national or ethnic origin of that second person or of any relative or associate of that second person.

Racial Discrimination Act, 1975, §§ 9, 12 (Austl.) [hereinafter RDA].

20. Whether Australia should adopt a Bill of Rights is an area of considerable debate, as the conference sponsored by the Gilbert and Tobin Centre of Public Law and the University of New South Wales on June 21, 2002, at the New South Wales Parliament House, illustrates well. See also MURRY R. WILCOX, *AN AUSTRALIAN CHARTER OF RIGHTS* (1993) (discussing the benefits and costs of a bill of rights from a federal judge's point of view); see also GEORGE WILLIAMS, *A BILL OF RIGHTS FOR AUSTRALIA* 35-36 (2000) (outlining the key arguments for and against a bill of rights).

external affairs power²¹ to enact legislation giving effect to the International Convention on the Elimination of All Forms of Racial Discrimination,²² which Australia ratified in 1975. Thus, the Court upheld the RDA (though more on procedural grounds than the fact it saw itself doing "the right thing").

Just three years later, the tides were reversed when a non-Native Australian, Robert John Brown, attempted to use the RDA to defend his rights to enter land which had been set aside for the Pitjantjatjara People under the Pitjantjatjara Land Rights Act of 1981.²³ Section 10 of the RDA held that individuals had the right to equality before the law,²⁴ and Mr. Brown argued that because he had been denied entrance to the Pitjantjatjara land on the basis of his race (i.e., a non-Native), he had clearly been denied equal treatment. In a unanimous decision and in a significantly conciliatory tone, the High Court ruled that the Pitjantjatjara Land Rights Act was valid in the degree to which it satisfied section 8(1) of the RDA²⁵ as an "appropriate

21. *Australian Constitution* s 51 (xxix).

22. International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter *Convention on Elimination of Discrimination*].

23. See *Gerhardy v. Brown* (1985) 159 CLR 70.

24. Racial Discrimination Act, 1975, § 10 (Austl.).

§ 10. Rights to equality before the law.

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

Id.

25. *Id.* § 8(1). This section of the RDA was based on Article 1, Paragraph 4 of the *Convention on Elimination of Discrimination* which states:

(4) Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

remedial step for a disadvantaged racial group.”²⁶ Thus, the High Court upheld the legitimacy of affirmative action in Australia. As the Court wrote, “[a] racial minority which wishes to preserve its own identity may need particular supports to preserve that identity, and it may need to preserve that identity if its members are not to be disadvantaged in the society of which it is a part.”²⁷ The seeds of the Court’s openness to Native Peoples and their needs had been sown.

Similar reasoning led the Court to strike down the Queensland Coast Islands Declaratory Act of 1985²⁸ in what is termed “*Mabo no. 1*,” the precursor to the ultimate *Mabo* decision (i.e., “*Mabo no. 2*” or “*Mabo*”).²⁹ This time, however, the Court’s vote was divided 4-3 and was grounded less on the RDA, per se, and more on Constitutional Provisions requiring that Commonwealth Legislation trump State Legislation if inconsistencies arose.³⁰ Essentially, the Queensland legislation addressed in *Mabo no. 1* did not involve the state setting aside land for Native Peoples, but instead involved the State excising land for Native Peoples (i.e., preventing Native Peoples from having rights to the land). The legislation, in specifically declaring that “any rights that Torres Strait Islanders had to land after the claim of sovereignty in 1879 [are] hereby extinguished without compensation,”³¹ had been passed in direct response to Eddie Mabo’s efforts to claim ownership of lands on Mer Island in the Torres Strait nestled between the Australian mainland and Papua New Guinea. After the High Court remanded the case to the Supreme Court of Queensland to determine the facts on which the case was based, the State Parliament swung into action and passed the legislation in the hopes that the case would not ever make it back to the High Court. It was because the legislation applied only to lands inhabited by the Torres Strait Indigenous Peoples that the Court found it unjustifiably racially limited in its scope.

Eddie Mabo did make it back to the High Court, where the Court in *Mabo* ruled 6-1 that the Meriam people were entitled to the

Convention on Elimination of Discrimination, *supra* note 22, art. 1, para. 4.

26. Australian Human Rights and Equal Employment Opportunity Commission, *Landmark Cases Under The Racial Discrimination Act 1975*, at http://www.hreoc.gov.au/racial_discrimination/guide_law/landmark.html (last visited Nov. 3, 2003) [hereinafter HREOC No. 1].

27. *Gerhardy*, 159 CLR at 136.

28. *Mabo v. Queensland* (1989) 166 CLR 186.

29. *Mabo v. Queensland* [No 2] (1992) 175 CLR 1.

30. *See Australian Constitution* s 109.

31. Queensland Coast Islands Declaratory Act, 1985 (Austl.)

possession, use, occupation, and enjoyment of most of the land of the Murray Islands. In upholding the claims of Eddie Mabo and his co-plaintiffs, the majority rejected the traditional doctrine that Australia was terra nullius (literally "land belonging to no one") at the time of European settlement. Instead, the High Court recognized Australia to have been occupied by Native Peoples at the time of European settlement.

In reaching its conclusion, the majority of the High Court essentially used the RDA as a springboard to determine that Australia's common law recognizes a form of "Native Title" to land. Therefore, pre-existing land rights survived colonization and may still exist today. Such "Native Title" is governed by the customs and laws of Native Peoples where they can demonstrate that "their traditional connexion [sic] with the land has been substantially maintained"³² and, most notably, where their "title has not been extinguished,"³³ by legislation or any action of the government executive "inconsistent with"³⁴ that Native Title.³⁵ Neither the establishment of the colonies nor the annexation of the three islands of the Meriam people by Queensland extinguished the title of the former users and occupiers of the land to exercise rights over that land according to native customs or laws.

Mabo was radical³⁶ because it recognized indigenous people had prior title to land taken by the Crown since Cook's declaration of possession in 1770. However, there was one key caveat: Native Title only remained where it had not been legally extinguished by some other means.³⁷ In some ways *Mabo* was revolutionary: in discarding terra nullius, the court admitted a legal fiction which was highly discriminatory and inconsistent with international law, thus providing the inklings of a cultural evolution in the Court's ability to accommodate Native People's needs. Advocates of Native Peoples' rights were further heartened by its likely: (a) social outcomes,

32. *Mabo*, 175 CLR at 66.

33. *Id.* at 69.

34. *Id.* at 2.

35. See HREOC No. 1, *supra* note 26 (discussing the import of *Mabo v. Queensland* [No 2] in Australian law vis-à-vis human rights).

36. See R. Nicholson, Cartoon, *THE AGE*, May 25, 1993, at 16; see also R. Nicholson, 2 *LEGAL SERVICES BULLETIN* 138 (1976) (containing political cartoons depicting the ridicule levied at Courts' attempts to employ arguably novel judicial interpretations in their decisions).

37. See *Mabo v. Queensland No. 2 1992 (Cth)* - *Significance of the Mabo Decision*, at <http://www.foundingdocs.gov.au/places/cth/cth18.htm> (last visited Nov. 13, 2003).

especially in the degree to which it recognized that the traditions and laws of Native Peoples were worthy of equal respect to those of the dominant culture; (b) economic implications, in that it gave Native Peoples the ability to control a valuable asset such as land; and (c) political power, specifically in recognizing that traditional Native Peoples' decision making structures revolved around land.³⁸

On the other hand, the fact that *Mabo* contained "legal armature" to extinguish Native Title, especially in the degree to which such title was broadly and poorly defined, suggested there was little "room to deliver real outcomes."³⁹ In the years that followed one could argue that discrimination against Native Peoples was not abated, but exacerbated by *Mabo's* holding, primarily because *Mabo* threatened the security of non-Native Australians who sought to retain their land.⁴⁰ Most ironically, the bases on which Native Title was thus fought, the RDA, were the very bases eroded by *Mabo*. This is illustrated in the extent to which non-Native Australians saw the RDA giving Native Peoples additional rights under the common law.⁴¹ It would not be long before *Mabo's* grand vision of Native Title became swallowed up by legislation and legal minutia with "fast tracking" development plans through a bludgeoned bureaucracy taking precedence over detailed assessments of the plans' effects on Native Peoples.⁴²

38. See Human Rights and Equal Employment Opportunity Commission, *Summary of Native Title Report: 2001*, at http://www.hreoc.gov.au/social_justice/ntreport_01/summary.html (last visited Oct. 27, 2003) [hereinafter *Native Title Summary*].

39. *Id.*

40. See *Indigenous People and Racism in Australia: Issues and International Commentary*, at http://www.hreoc.gov.au/social_justice/nt_issues/IWGIA.pdf (last updated Oct. 7, 2003); see also HREOC, Aboriginal & Torres Strait Islander Social Justice, *Native Title*, at http://www.hreoc.gov.au/social_justice/native_title/index.html (last visited Nov. 13, 2003).

41. See Benedict Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 N.Y.U. J. INT'L L. & POL. 189 (2001). Benedict Kingsbury writes how Native Peoples are currently able to claim Native Title on a variety of bases today, lending credence to the argument that the Court's ruling in *Mabo* exceeded the scope of the RDA. These bases include (a) human rights & non-discrimination; (b) minority status; (c) self-determination rights; (d) historic sovereignty bases; and (e) claims as Indigenous people, including claims based on treaties or other agreements. He does not comment on the potential of other claims, such as current implied sovereignty, which is discussed as a possible future—and arguably more stable—option in Part IV of this paper. *Id.*

42. See *Native Title Summary*, *supra* note 38.

Future court cases served to define more clearly what extinguished Native Title. In *Wik*,⁴³ the High Court made two dramatic holdings. First, it said that Native Title could coexist with pastoral leases,⁴⁴ leading directly to fears of property devaluation, concerns over the extent of property claims, and worries over frivolous claims.⁴⁵ Second, the Court held that when Pastoral Leases and other statutes addressing land interests expire, the Crown does not necessarily acquire "reversionary interest which entails full beneficial ownership and control exclusive of Native Title."⁴⁶ In other words, it was not clear who controlled the land. Determining control would be assessed on a case-by-case basis. Fortunately, *Wik* did establish a proviso that "in the event that Native Title is inconsistent with pastoral leases, pastoral interests should prevail."⁴⁷ Still, the Court's tenor in discussing non-Native Peoples "prevailing" over Native Peoples suggested that reconciliation was fast becoming an impossible dream.

43. *Wik v. Queensland* (1996) 63 FCR 450.

44. Leasehold lands currently make up forty-two percent—or about half—of Australia's entire landmass, with most of this pastoral leasehold. Garth Nettheim, *Responding to Wik: First, Define the Problem*, INDIGENOUS L. BULL., Apr. 1997, at 14-15, (referencing the Australian Surveying and Land Information Group as of 1994), construed in Gary D. Meyers & Sally Raine, *Australian Aboriginal Land Rights in Transition (Part II): The Legislative Response to the High Court's Native Title Decisions in Mabo v. Queensland and Wik v. Queensland*, 9 TULSA J. COMP. & INT'L L. 95, 105 n.55 (2001).

45. One of the most publicized cases was that of the Larrakia People who claimed all undeveloped Crown land in Darwin and its environs, including Bicentennial Park in Darwin's business district. A second, highly publicized claim was that of the Yorta Yorta People to 10,000 km² of land (including four state forests & four major rivers), as well as compensation for 16,000 km² of land lost to freehold title. Ultimately, the full Federal Court struck down the Yorta Yorta claim in *The Members of the Yorta Yorta Aboriginal Community v. The States of Victoria & Ors* (1998) 1606 FCA 1. See Darrin Farrant & Peter Gregory, *Yorta People Thrown a Lifeline*, THE AGE, Feb. 9, 1991; see also Wayne Atkinson, *Yorta Yorta Struggle for Justice Continues*, available at <http://home.vicnet.net.au/~aar/yorta.htm> (last visited Oct. 29, 2003); see also Rod Hagen, *Yorta Yorta Native Title Hearings: A Daily Commentary on the Progress of Justice*, Web Publication of MMG, at <http://www.mountainman.com.au/yorta.html> (last updated Nov. 7, 1996); see also *Mixed Fortunes and Two Appeals in the Federal Court*, ATSC NEWSWIRE NO. 42, Sept. 1999, at 19, available at <http://indigenous.gibsonnet.net/yorta2.html> (last visited Oct. 27, 2003).

46. Meyers & Raine, *supra* note 44, at 105 n.58.

47. Gilda C. Rodriguez, Note, *Wik Peoples v. State of Queensland: A Restrained Expansion of Aboriginal Land Rights*, 23 N.C. J. INT'L L. & COM. REG. 711, 734 (1998).

Wik was criticized even more than *Mabo*.⁴⁸ It set the stage for legislative initiatives that would ultimately erode the hope *Mabo* provided to Native Peoples and the durability of Native Title.

B. Ensuing Problems

The ensuing problems from *Mabo* and *Wik* are multifaceted, though inevitably they stem from the amorphous concept of Native Title, which the Court failed to define in any significant or durable sense. On the one hand *Mabo* can be faulted for addressing Native Title only vis-à-vis limited "title" rights, failing to address explicitly issues such as hunting and fishing rights; water and sea rights; mining and ore rights; and, most important, coexistence with Pastoral Leases. The Court might be given credit for wanting to avoid such specificity in the interest of not appearing legislative, respecting the separation of powers ingrained in the Australian Constitution. However, the pretentious language reflected a self-awareness of its radical holding—a holding which it reasonably should have predicted would demand further guidance. In this light, the High Court's greatest failure was not discussing more explicitly the terms under which Native Title could be extinguished, ultimately appearing "undecided [about Native Title's existence] . . . pre-*Mabo*, where [Native Title] may *continue to exist* within Australia, and how *existing* Native Title could be claimed or extinguished."⁴⁹ This lack of any "comprehensive statement" regarding the "nature of Aboriginal title"⁵⁰ is thus egregious, with *Wik* only serving to undermine any further attempts at certainty⁵¹ with its failure to address how lands should be managed which might conclusively not be owned by anybody at all.⁵²

Mabo also appears to contradict itself with regards to Native Title, as if the Court wanted to have its cake and eat it too. On the

48. Robert S. French, *Wik and Beyond—An Overview of the Proposed Amendments to the Native Title Act of 1993*, in *IN THE WAKE OF WIK: OLD DILEMMAS; NEW DIRECTIONS IN NATIVE TITLE LAW* 111, 119 (Gary D. Meyers ed., 1999) (commenting the ferocity of the reaction in the *Mabo* decision paled in comparison to the response when *Wik* was handed down), *construed in* Meyers & Raine, *supra* note 44, at 114 n.95.

49. See Michael Legg, *Indigenous Australians and International Law: Racial Discrimination, Genocide and Reparations*, 20 *BERKELEY J. INT'L L.* 387, 403 (2002) (emphasis added).

50. Julie Cassidy, *Aboriginal Title: "An Overgrown and Poorly Excavated Archeological Site"?*, 10 *INT'L LEGAL PERSP.* 39, 40 (1998).

51. Legg, *supra* note 49, at 405.

52. See FRANK BRENNAN, *THE WIK DEBATE: ITS IMPACT ON ABORIGINES, PASTORALISTS, AND MINERS* 38-43 (1998).

one hand, "indigenous interests are not defined by reference to the rights or interests in land which form the law of real property at common law,"⁵³ due to the simple fact that Native Title is unique and reflects a sui generis set of rights that are "not confined to interests which were analogous to common law concepts or estate in land or proprietary rights."⁵⁴ On the other hand, the High Court noted Native Title "may conform to traditional common law concepts of rights and interests in land."⁵⁵ One wonders how Native Title is to be best understood. Is it true that the rights at one time transcended the common law, but they do not anymore? Or is it true that, even today, Native Title rights are "special rights" with a "special place" in common law which are ideally viewed as transcending the law? Indeed, pre-existing interests of Native Title are "presumed to survive the assertion of sovereignty" in a form that transcends the common law, unless "expressly confiscated at that time or extinguished or expropriated by legislation thereafter."⁵⁶ But if this is the case, then there is reason to worry if they are left ill defined.

The Court could be given credit for attempting to define Native Title better in the years following *Mabo*, though these attempts proved fruitless. In *Fejo v. Northern Territory of Australia*,⁵⁷ the Court held that previous freehold expressly extinguishes Native Title. This was followed in *Yarmirr v. Northern Territory*,⁵⁸ in which the Court held no Native Title existed over any seas abutting the Northern Territory because this conflicted with common law public rights to navigate and fish, as well the international right of "innocent passage."⁵⁹ What these cases illustrated, however, was less what defined the "novel" idea of "Native Title" and more how the potentially novel idea of Native Title was not novel at all. The Court simply said what Native Title was not, leaving it partially undefined and destined to be obliterated by "common law" concepts which were more firmly entrenched and concretely characterized. This upshot paralleled reports of the government's "refusal to apologize for past practices or offer any form of repatriation to Native Peoples."⁶⁰ In essence, Native

53. Meyers & Raine, *supra* note 44, at 98.

54. *Id.* at 98 nn.13 & 15.

55. *Mabo v. Queensland [No 2]* (1992) 175 CLR 1.

56. Meyers & Raine, *supra* note 44, at 98 n.17.

57. 156 ALR 721.

58. 184 ALR 113.

59. Legg, *supra* note 49, at 410.

60. *Id.* at 387.

Title's ambiguity was addressed by leaving little room for Native Title, and the rights of Native Peoples, to coexist with anything else.

This legal formlessness had significant negative ramifications in other areas such as: (a) ensuring Native Peoples' rights, (b) managing administrative burdens for Native Peoples, (c) approaching reconciliation, and (d) developing symbols which reflected the new order which *Mabo* sought to stimulate. Each is considered in turn.

First, the Court's failure to define Native Title while acknowledging the State's ability to extinguish Native Title set a precedent which only served to relegate Native Peoples' rights to the dominant culture and ultimately defy the Court's strongly worded rhetoric. It was not long before it became clear that "[i]ndigenous title is on the bottom rung of property law in Australia."⁶¹ Moreover, there were few guideposts that would help Native Peoples "ascertain" how to make sense of the "bundle of rights"⁶² that *Mabo* had given them. *Mabo* had only stated that where the Crown had validly (a) "alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title,"⁶³ or (b) "effectively appropriated land to itself and the appropriation is wholly or partially inconsistent with a continuing right to enjoy native title," then Native Title is extinguished to the "extent" of the inconsistencies.⁶⁴ *Mabo* then subsequently failed to address any issues relating to the (a) alienation of land (freehold and leasehold); (b) grants of lesser interests (e.g., authorities to prospect for minerals); (c) appropriation of land by the crown; (d) pastoral leases and interests granted under mining and petroleum legislation; (e) pastoral leases; (f) mining & petroleum interests; (g) individual miner's rights; (h) exploration licenses; (i) retention leases (where one does not proceed to mine immediately but wants to hold on to the right); (j) miscellaneous purpose licenses; (k) mining leases; (l) petroleum exploration licenses; or (m) petroleum production licenses.⁶⁵ Without reiterating these rights, the Court left one wondering if they had any real rights at all.

Second, these frustrations were exacerbated by administrative procedures which the government designed to help Native Peoples

61. Bill Jonas, *High Court Confirms Extinguishment in Native Title Legislation*, Human Rights and Equal Employment Opportunity Commission: 2002 Media Releases, Aug. 15, 2002, at http://www.hreoc.gov.au/media_releases/2002/48_02.html (last visited Oct. 27, 2003).

62. T. A. Gray, *The Myths of Mabo*, in *ESSAYS ON THE MABO DECISION* 48 (1993).

63. *Mabo v. Queensland [No 2]* (1992) 175 CLR 1.

64. *Id.*

65. See Gray, *supra* note 62, at 160-70.

determine where Native Title existed. The Native Title Act of 1993 was the government's answer to *Mabo* and its first attempt to help Native Peoples apply for recognition of Native Title lands which were consistent with *Mabo's* principles. In light of the above observations, however, the inevitable wrangling which resulted between Native Peoples and other land owners resulted in exceedingly long delays, intense frustration on all sides,⁶⁶ and scant results.⁶⁷ Geoff Clark, Commissioner of the Aboriginal and Torres Strait Islander Commission (ATSIC), felt such results should have sharpened Australia's "determination to find another, more certain process . . ."⁶⁸ What that process will be, or could be, is an open question, with Clark today noting only that it "may well lead to the negotiation of a treaty."⁶⁹

Third, many of these concerns also fueled the greater difficulties faced by Australia's Native Peoples in making a case for establishing true reconciliation. Australia's public has been faced with the harsh realities of its nation's past with which it feels it must come to terms. The recent film "Rabbit Proof Fence"⁷⁰ is a case in point, dramatizing

66. See One Nation, available at <http://www.onenation.com.au> (illustrating propaganda distributed by the One Nation Party dramatizing the extent of Native Title Claims) (last visited Nov. 29, 2003); see also National Native Title Tribunal, available at http://www.nntt.gov.au/publications/national_maps.html (Geographic Extent of Claimant Applications as per Register of Native Title Claims map illustrating the actual extent of Native Title Claims as of 30 September 2002) (last visited Nov. 29, 2003) [hereinafter National Native].

67. See National Native, *supra* note 66 (Determinations of Native Title map illustrating the actual Native Title grants made as of Sept. 30, 2002).

68. Taylor, *supra* note 8.

69. *Id.*

70. RABBIT PROOF FENCE (Miramax Films 2002) (dramatizing the experiences of three Native Youngpeople who escaped from the Moore River Native Settlement to where they had been forcibly moved after being separated from their mother in Jigalong (in northern Australia) in 1931 over a thousand miles away; it was described as causing a "fury" in Australia by David Fickling, *The Stolen Ones*, THE GUARDIAN, Oct. 25, 2002, at 28); see also THE TRACKER (Vertigo Productions 2002) (depicting the experiences of Native Peoples in the Australian Outback in 1922); see also BLACK AND WHITE (New Vision Productions 2002) (dramatizing the landmark murder trial of Max Stewart, a Native Australian from far west desert town of Ceduna, who was sentenced to death in 1958 based on nothing more than a dubious confession for raping a eight year old girl); see also AUSTRALIAN RULES (Palace Films 2002) (depicting the story of a young non-Native's romance with a beautiful Native Australian woman in a small, racially divided community in rural Australia, placing the history of Native/Non-Native relations in a more contemporary context); see also BENEATH CLOUDS (Axiom Films 2002) (portraying the challenges faced by a young

the horrific effects of Australia's mixed-race child resettlement program from 1905 through 1971.⁷¹ This is contrasted with the fact that "it is now generally conceded, even by the most enthusiastic supporters of Native Title, that the \$100 million expended by the Commonwealth on Native Title . . . has failed to deliver any real improvement in the economic well being of the Aboriginal people."⁷² How to dismantle a frustratingly expensive system that has not worked while ameliorating the past has thus proved increasingly elusive.

Finally, there is the fact that *Mabo's* amorphous ruling has made it more difficult for Native Peoples to develop the symbols to reflect the new order that *Mabo* ostensibly sought to stimulate. At the core of *Mabo's* "revolution"⁷³ was a reformulation of Native Title and, more significantly, a means of acknowledging, honoring, and respecting Native Peoples' rights. However, the revolution could never be realized in any true form if these principles could be "extinguished." Indeed, if property interests are on the one hand recognized as a locus of one's cultural heritage and then on the other hand open to blatant infringement,⁷⁴ one cannot conclude the former carries any lasting import. There is significant irony in this observation, particularly in

non-Native woman and a Native Australian just recently released from prison and eschewed by his family who attempt to build a relationship in rural Australia); see also 7 STAGES OF GRIEVING (Sydney Theatre Production 2002) (addressing the issues of race and class among Native Australian Peoples under the genre of "Australian Indigenous Theatre"); see also TRACE OF SOMEONE (Artistic Exhibition, Steel & Glass 2002) (described as a "reminder of the outsider" in Australia today, such as Native Peoples, immigrants, and migrants).

71. The program was grounded on the notion that the only way of solving Australia's "coloured problem" was by breeding the "coloured blood" out of mixed-race children. Children were therefore forcibly separated from their respective families and resettled with non-Native families or placed in orphanages where they would learn to assimilate into the dominant, non-Native culture.

72. Richard Egan, *Aboriginal Affairs: Mabo Decision - Ten Years of Frustration*, NEWSWEEKLY, July 13, 2002, at 3, available at http://www.newsweek.com.au/articles/2002jul13_mabo.html (last visited Oct. 27, 2003).

73. See MABO, *supra* note 4.

74. See Michael Dodson, *Human Rights and the Extinguishment of Native Title*, in INDIGENOUS AUSTRALIANS AND THE LAW 149 (1997) (arguing the infringement of any form of Native Title via extinguishment is tantamount to a fundamental infringement of human rights). Dodson further argues that Australian Native Peoples should not underestimate the benefits of attempting to engage "international complaint procedures" more frequently (e.g., the United Nations), though Part IV of this paper argues that a more enduring solution within Australia is ultimately needed before any form of true reconciliation is established. *Id.* at 164.

the degree to which it contradicts the positions of Justices Mason and McHugh, who in *Mabo* sought to debunk the position of Lord Sumner speaking for the Privy Council in *In re Southern Rhodesia*:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.⁷⁵

In this light, one wonders if Sumner was correct in assuming there must be completely "separate spheres of tribal and state autonomy,"⁷⁶ giving as little weight to the laws of Australian Native Peoples as the United States has given to Native American cultural practices that conflict with national or state laws.⁷⁷ Such an approach reflects the degree to which archeologists—previously lauded for their work—have been increasingly seen as threats, particularly in their ability to come to the aid of Native Peoples in their efforts to demonstrate the timelessness and strength of their traditions.⁷⁸ Such ideas appear to preclude a fortiori any forms of joint or shared sovereignty, though as this paper addresses in Part IV this is not a foregone conclusion.

III. CODIFICATION OF NATIVE PEOPLES' RIGHTS & INEVITABLE EROSIONS

The Australian Parliament addressed the fears stemming from *Mabo* by passing the Native Title Act of 1993 (NTA) and following

75. *In re Southern Rhodesia* (1919) AC 233-34, reprinted in *Mabo v. Queensland* [No 2] (1992) 175 CLR 1.

76. Dan Tarlock, *Australian and United States Law of Aboriginal Land Rights: A Comparative Perspective*, 1 RES COMMUNES: VT'S. J. ENV'T 4, 20 (1998-99).

77. *Id.* at 21-22. Tarlock also points out the degree to which the United States has rejected cultural and religious practices among Native Americans as grounding legitimate legal claims. As evidence, he cites *Lyng v. N.W. Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988), in which Sandra Day O'Connor writes that "no disrespect for [Indian religious practices] is implied when one notes that such beliefs could easily require de facto ownership of . . . spacious tracts of public property." Tarlock, *supra* note 76, at 11-12 n.33.

78. See Tim Murray, *Creating a Post-Mabo Archeology of Australia*, in IN THE AGE OF MABO: HISTORY, ABORIGINES AND AUSTRALIA 73, 75 (1996).

Wik, the Native Title Amendment Act of 1998 (NTAA). Through this legislation, Parliament was essentially clarifying what it thought the High Court was holding while placating the needs of non-Native individuals and businesses. These legislative developments led largely to joint land management schemes,⁷⁹ concurrent land-use agreements,⁸⁰ and alternative dispute resolution procedures which testified to Australia's ability, as a "younger and perhaps a more easily influenced country,"⁸¹ to address *Mabo's* implications. Unfortunately, however, these initiatives ultimately proved either inadequate or inappropriate, leading again to further and deeper erosion of Native Title rights. If there were any hopes as to what Native Title could be, these were increasingly dashed. Ultimately, the Court symbolically threw up its hands by deciding *Ward and Wilson* in August 2002. As with its other decisions addressing Native Title, the High Court only served to further clarify and confirm the extent to which States can extinguish Native Title. Native Title is inevitably doomed because it rests on an ill-defined legal concept.

A. Legislation: NTA and the NTAA

The NTA embodied the Legislature's attempt to clarify how the High Court's principles in *Mabo*, in particular the recognized existence of Native Title in the absence of extinguishment, could be managed without excessive litigation.⁸² Central to the legislation was the creation of a National Native Title Tribunal (NNTT), which would operate as a mediator and liaison to ensure litigation was only pursued if absolutely necessary. The NTA was groundbreaking because it was the first legislative effort in Australia seeking to fully protect the rights of Native Peoples.⁸³

Writing the NTA required addressing a host of challenges and issues. Foremost among these was deciding how to deal with mining

79. See Maureen Tehan, *Customary Title, Heritage Protection, and Property Rights in Australia: Emerging Patterns of Land Use in the Post-Mabo Era*, 7 PAC. RIM L. & POL'Y J. 765 (1998).

80. *Id.*

81. Amy Sender, Note, *Australia's Example of Treatment Towards Native Title: Indigenous People's Land Rights in Australia and the United States*, 25 BROOK. J. INT'L L. 521, 553 (1999).

82. See Bruce Petty, *Terra Litigious*, THE AGE, June 13, 1993, in NONIE SHARP, NO ORDINARY JUDGMENT 18 (1996) (containing cartoon predicting an onslaught of litigation post-*Mabo*).

83. See David Hodgkinson, *Protection of Minority Rights in Australia: The Present Legal Regime*, 19 LOY. L.A. INT'L & COMP. L. REV. 857, 870-71 (1997).

commitments and mineral rights, which the government had distributed with clearly defined terms. With the granting of Native Title, many wondered if these rights would be extinguished automatically. Second, there were historical complications. Many British authorities had openly recognized Native Peoples as owning land, evidenced by dispatches to Australia by British colonial offices, proclamations of the House of Commons, and private correspondence between government officials.⁸⁴ The Legislature was thus faced with the simple fact that the more broadly it defined Native Title in the NTA, the more significant the land use conflicts would be. Unsurprisingly, the Legislature took the middle road: (a) recognizing Native Title in comparatively broad language⁸⁵ with "key" constraints,⁸⁶ (b) including provisions ensuring the impact was minimized for non-Native Peoples,⁸⁷ and (c) giving Native Peoples a "Right to Negotiate" (RTN),⁸⁸ which meant any disputes over land claims would need to first proceed through a clearly delineated administrative process before advancing to any court. Native Title thus became a "permissive right to occupy the land," which included the rights to possess, use, and occupy the area, and the rights "to make decisions about the area's uses, to access and control others' access to the area, to use and enjoy the area's resources, to trade in the area's resources, to receive royalties from the use of those resources and to protect important cultural sites and knowledge."⁸⁹ The legislature also recognized the rights of non-Natives which had already been granted (e.g., through leases). When there was a conflict between titles granted by the Crown and Native Title, the Crown prevailed. The RTN also squared firmly with the Administration's interests of pursuing a policy of "self-determination" and "self-management" for Native Peoples.⁹⁰ This policy focused on creating

84. See Stan Pelczynski, *The Australian High Court Recognition of Native Title—The Mabo Judgment and Its Implications* (1993), at <http://www.innu.ca/mabo.html> (last visited Oct. 29, 2003).

85. See Native Title Act, 1993, § 10 (Austl.) [hereinafter NTA] (noting that "[N]ative [T]itle is recognized, and protected, in accordance with this Act.").

86. See *id.* §§ 13A-23JA (summarizing the ways in which past extinguishment of Native Title could have occurred).

87. See *id.* §§ 24AA-60AA.

88. See *id.* §§ 75-77.

89. Meyers & Raine, *supra* note 44, at 108 n.69.

90. See Exhibit 3, *noted in* the Appendix (summarizing the approaches towards Native Peoples taken by various Australian administrations from 1972 to the present).

Aboriginal enterprises, restoring Native Peoples' connection to the land, and providing compensation for lands taken after the RDA (as long as non-Natives were compensated for land that was taken from them as well).⁹¹

Despite "intense" and "hostile political and community comment,"⁹² the RDA passed and commenced operation. By January, 1994, the NNTT was established and Native Title Representative Bodies (NTRBs) fanned across Australia to begin working as quasi-"mediation service[s]" to help individuals resolve their claims.⁹³ The roles of the ATSIC Commissioner were broadened⁹⁴ to include authority over implementing provisions of both the NTA and a range of international agreements.⁹⁵

The NTA was tested just two years after its passage in *Western Australia v. Commonwealth*,⁹⁶ which considered whether the NTA trumped the Western Australia Land (Titles and Traditional Usage) Act of 1993 (WA). The latter Act purported to extinguish all Native Title in Western Australia and replace it with a regime of statutorily managed "rights of traditional usage." In its decision, the High Court found (a) the NTA was a valid exercise of Parliamentary power under

91. See Meyers & Raine, *supra* note 44.

92. *Id.* at 96.

93. *Id.* at 100.

94. See NTA, *supra* note 85, § 209.

95. These agreements include: *Universal Declaration of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948); *International Covenant on Economic, Social, and Cultural Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966); Convention on Elimination of Discrimination, *supra* note 22; Convention Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, available at <http://www.unhchr.ch/html/menu3/b/62.htm> (last visited Oct. 29, 2003); Draft Declaration of the Rights of Indigenous Peoples, available at <http://www.usask.ca/nativelaw/ddir.html> (last visited Oct. 29, 2003); Convention on Biological Diversity, available at <http://www.biodiv.org/convention/articles.asp> (last visited Oct. 29, 2003) (recognizing contributions indigenous peoples can make to the "conservation and management of biological diversity"; Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act*, 1998, 23 MELB. U. L. REV. 372, 391 (1999)); and Convention on Conservation of Nature in the South Pacific, June 12, 1976, available at <http://sedac.ciesin.org/pidb/texts/nature.south.pacific.1976.html> (detailing provisions for the customary use of areas and species in National Parks and National Reserves in accordance with traditional customary practices; Triggs, *supra* at 392).

96. *Western Australia v. Commonwealth*, (1995) 183 CLR 373.

the Constitution,⁹⁷ (b) Native Title in Western Australia was not extinguished upon settlement, and (c) the Western Australia Act was invalid in the degree to which it was inconsistent with the RDA because it made rights of "traditional usage" subject to extinguishment and implicitly fell under the aegis of a separate and unequal doctrine. In this way, the Court held the RDA was the key standard by which Native Title state legislation would be judged. In addition, the RDA continued to form the basis of the High Court's evolving doctrine regarding Native Title claims, which are most clearly asserted in *Mabo*.

After *Wik*, increasing sentiments that the NTA had caused the "pendulum" to swing "too far in the indigenous direction"⁹⁸ compelled the Liberal government under the leadership of John Howard to propose a ten-point plan to address the NTA's problems.⁹⁹ The plan purported to encourage that Native Peoples be treated with an eye to "self-empowerment"¹⁰⁰ instead of state assistance. The amendments were largely driven by arguments that (a) terra nullius was purely an argument of unfounded guilt and an attempt to assuage it; (b) there

97. See *Australian Constitution* s 51. It states that "Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: . . . (xxvi). The people of any race, for whom it is deemed necessary to make special laws" *Id.* Because this clause addresses issues of race (which by implication includes Native Peoples) it has often been termed the "race clause" or the "race power." Notably, the clause formerly included the words "other than the aboriginal race," though these words were deleted after a Constitutionally-mandated referendum was passed (89.34% in favor) on May 27, 1967, leading to the Constitution Alteration (Aboriginals) Act of 1967 (ensuring that Native Peoples were counted in calculating the population of the Commonwealth and every SAT, as well). The Constitution (§ 128) requires that any constitutional amendments be passed by a national referendum with an (a) overall national majority and (b) a majority in four of Australia's six states; voting is also compulsory under the Commonwealth Electoral Act of 1918, § 101(1) (requiring all individuals "entitled" to vote to "register" to vote and actually "vote"); see also BBC World Service, *Voting Compulsory for All Australians*, BBC NEWSWIRE, Oct. 26, 2001 (noting how Australian referendum results have a high correlation with actual public sentiment).

98. Interview by Natasha Johnson with Bonita Mabo, Widow of Eddie Mabo (Mar. 6, 2002), available at <http://www.abc.net.au/7.30/s572090.htm> (last visited Oct. 29, 2003).

99. See Garth Nettheim, *The Search for Certainty and the Native Title Amendment Act*, 1998, 22(2) U.N.S.W. L. J. 564 (1999); see also Richard Bartlett, *A Return to Dispossession and Discrimination: The Ten Point Plan*, 27(1) U. W. AUST. L. REV. 44 (1997); see also R. S. French, *A Hitchhiker's Guide to the Native Title Act*, 25(2) MONASH U. L. REV. 375 (1999); see also Legg, *supra* note 49, 406 n.99.

100. See Exhibit 3, *supra* note 90.

were inconsistencies in international law which Australia failed to recognize (e.g., the Turks held Asia-Minor and the city of Istanbul; China held Tibet; and the US has Guam and Hawaii);¹⁰¹ (c) if declaration of Britain's sovereignty was not sufficient to extinguish pre-existing Native Title, then it did not make sense that the granting of freehold would do so;¹⁰² (d) the High Court did not have any jurisdiction over Native Lands by the implications of its own admissions in *Mabo*; and (e) the Mer Islands considered in *Mabo* differed markedly from mainland Australia invalidating the Court's decision in *Mabo* over any lands not in the Torres Strait.¹⁰³ More important, and far more serious as far as non-Native government leaders were concerned, were businesspeople's concerns that while RTN ensured "indigenous participation as well as consensual and procedural agreement,"¹⁰⁴ it also led to greater uncertainty since it was not clear what would result. This translated into macroeconomic fears of lowered economic growth which hampered Australia's global competitiveness.

101. See Rob Perez, *Kingdom Supporters Take Case to World Body*, HONOLULU STAR BULLETIN, Jan. 3, 2000, available at <http://starbulletin.com/2000/01/03/news/story3.html> (last visited Oct. 29, 2003) (publicizing the case of *Lance Paul Larsen v. the Hawaiian Kingdom* brought before the Permanent Court of Arbitration in the Hague, the Netherlands, and arguing that Hawaii is not a legal state of the U.S. under international law); see also David Keanu Sai, *Van Dyke in Gross Error*, available at http://www.alohaquest.com/arbitration/news_vandykeinerror.htm (last visited Oct. 29, 2003) (arguing that Hawaii is illegally a part of the U.S. because the relations between the U.S. and the Hawaiian Kingdom fail to fall into any of the five ways which international law has recognized states' acquiring territory: (a) occupation by discovery; (b) accretion (e.g., expansion by natural means, such as landfills and lava); (c) cession (i.e., "voluntary" transfer of landed territory such as in the Louisiana or Alaska Purchases); (d) conquest (i.e., by treaty or surrender); and (e) prescription (i.e., through the passage of time and a given country's silence)).

102. This is because the legality of freehold depended on the legality of the sovereign to grant freehold.

103. Among the differences highlighted in press reports were the fact that (a) *Mabo* and Torres Strait Islanders were Melanesian and not Aboriginal, thus implying that the Court's agreement should have been limited in scope, (b) the island of Mer was annexed by Queensland in 1879 and set aside in 1882 for exclusive use of natives, making their need for Native Title moot; and (c) natives were on the islands around Mer continuously except for a small parcel leased by the Crown to the London Missionary Society and a sardine factory.

104. Gretchen Freeman Cappio, *Erosion of the Indigenous Right to Negotiate in Australia: Proposed Amendments to the Native Title Act*, 7 PAC. RIM L. & POL'Y J. 405 (1998) (arguing that the NTAA amendments—which were ultimately passed—ran the risk of significantly and deleteriously eroding the rights of Indigenous People in Australia).

The NTAA's effects¹⁰⁵ illustrate the extent to which the NTAA altered the NTA and hurt Native Peoples' interests. Among the most egregious changes as far as Australian Native Peoples were concerned related to the practical extinguishment of RTN. Changes to the NTAA allowing states to implement alternatives to RTN as long as the legislation met minimal standards, which were arguably insufficient to fully "protect Indigenous interests in land."¹⁰⁶ Giving states the authority to eliminate the RTA was equivalent to allowing states the ability to eliminate any say of Native Peoples regarding their traditional lands, which were ostensibly subject to Native Title. Granted, these prohibitions were not guaranteed and theoretically moderated by alternative consultation schemes reiterated in the NTAA. However, soon after the NTAA's passage, Queensland passed measures updating the way it managed the Native Title determination process.¹⁰⁷ This led Dr. Bill Jonas, the ATSIC Commissioner, to decry the changes and highlight how they would "erode native title rights for indigenous people in Queensland."¹⁰⁸ Second, what was most onerous and troubling was the fact that the amended NTA also exempted State legislation regarding Native Title from key provisions of the RDA, which had formed the basis of *Mabo* and grounded Native People's hopes in securing Native Title. Native Title, in whatever form one might have deemed it to exist, thus seemed to have little footing following the NTAA, except the High Court's naive and blindly optimistic vision explicated in *Mabo*, which remained evermore elusive.

105. Exhibit 4, *noted in* the Appendix (assessing the way in which the NTAA increased or decreased the power of key constituencies); Exhibits 5-10, *noted in* the Appendix (summarizing the key areas affected by the NTAA and assesses the effects of these changes on Australia's Native Peoples). In summary, as illustrated in Exhibit 10, the NTAA significantly curtailed and limited the rights of Native Peoples; *see also* Paul Burke & the ATSIC Wik Team, *Analysis of the Native Title Amendment Act of 1998*, Aug. 1998, available at http://www.atsic.gov.au/issues/Land/Native_Title/detailed_analysis_of_the_native_.asp (informing key points in the exhibits heretofore noted) (last visited Oct. 29, 2003).

106. Jonas, *supra* note 61.

107. *See* NTA, *supra* note 85.

108. Bill Jonas, *The Queensland Native Title Regime*, AUSTRALIAN HUMAN RIGHTS AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION: 2000 MEDIA RELEASES, June 4, 2000, available at http://www.hreoc.gov.au/media_releases/2000/00_11.html (last visited Oct. 29, 2003).

B. Recent Cases: Ward (Miriuwung Gajerrong) and Wilson

If one had reason to suspect the High Court would clarify its vision in *Mabo* after the NTAA, these hopes were dashed in August 2002, with the decisions of *Ward* (also known as *Miriuwung Gajerrong* after Native Peoples who were parties to the case)¹⁰⁹ and *Wilson*.¹¹⁰ Stemming directly from the fact that *Mabo*'s precepts, particularly with regards to "natural resources industries," were "vague and manipulable,"¹¹¹ and that Pastoral Leases had increasingly become a "subject of speculation"¹¹² because it was unclear to what extent they were insulated from Native Title claims, the Court attempted to clarify what land interests took precedence over others and when Native Title "kicked in."¹¹³ Unfortunately, the Court apparently still did not come to grips with the fact that the concept of Native Title was still elusive.

Within days of releasing its opinion in *Ward* (a 312-page tome sporting 1064 footnotes and 973 paragraphs), Dr. Jonas commented the Court had only ensured Native Title was destined to be governed by "legislation rather than the principles established in *Mabo* or *Wik*."¹¹⁴ The upshots of *Ward* and *Wilson* seemed only to be that

[a] some interests in land completely extinguish native title, that [b] there can be partial extinguishment of native title and that [c] native title rights to minerals and petroleum may be extinguished by . . . resource legislation . . . [and] [d] the grant of a pastoral lease . . . extinguishes the (native title) right to control access and . . . pastoral leaseholder, . . . rights prevail over the native title rights.¹¹⁵

Because this was independent of the fact that ownership of most minerals and ores typically vested in landowners at common law,¹¹⁶ the Court suggested if there was any question that Native Title was independent of the common law, it was now confirmed. Because the

109. See *Western Australia v. Ward* (2002) 191 ALR 1.

110. See *Wilson v. Anderson* (2002) 190 ALR 313.

111. J.R.S. Forbes, *Mabo and the Miners—ad ininitum?*, in *MABO: THE NATIVE TITLE LEGISLATION* 49 (M.A. Stephenson ed., 1995) [hereinafter *MABO LEGISLATION*].

112. M. A. Stephenson, *Pastoral Leases and Reservation Clauses*, in *MABO LEGISLATION*, *supra* note 111, at 104.

113. See Exhibit 2, *noted in* the Appendix (summarizing the array of events which led up to the High Court's decisions in *Ward* and *Wilson*).

114. Jonas, *supra* note 61.

115. *Id.*

116. HEATHER MCRAE ET AL., *ABORIGINAL LEGAL ISSUES* 187 (1991).

Court's main holding in *Mabo* was that Native Title held under common law, one was left wondering what the court was really saying.

Identifying the locus of the confusion requires one first understand more precisely what the holdings in *Ward* and *Wilson* were. Only following such an analysis can one see more clearly why *Ward* required 312 pages and, quite likely, future decisions will be even more voluminous given Native Title's judicial trajectory.

At issue in *Ward* was whether Mining and Pastoral Leases issued by the State extinguished Native Title and secondly, what rights and interests, if any, accrued to states and Native Peoples in their quest to secure their rights. Within the boundaries of the lands addressed in *Ward* was the notable Argyle Diamond Mine,¹¹⁷ the world's single largest producer of diamonds currently valued at A\$2,075,800,000. Therefore, from *Ward's* inception it was clear that whoever "won" stood to gain extraordinary and arguably unparalleled economic rewards. Similarly, at issue in *Wilson* was whether land subject to a perpetual grazing lease conferred exclusive possession to the lessee; unlike in *Ward*, however, there was no diamond mine at stake.

The Court's holdings in *Ward* and *Wilson* can be divided into two categories: the first addressing issues of extinguishment, and the second addressing the rights and interests of key constituencies. Both, as noted above, illustrate how the concept of Native Title as it now exists in Australia carries little import since what remains can easily be extinguished entirely. An alternative system is thus needed to secure Native Peoples' rights in the hopes of achieving any reconciliation.

First, with regards to extinguishment, the Court found that Pastoral and Mining Leases extinguish some Native Title rights, particularly vis-à-vis the rights to control access to land. On the other hand, Pastoral and Mining Leases do not give one exclusive possession of land, so they cannot be said to extinguish Native Title fully. Native Title for these purposes is thus best seen as containing a "bundle" of different kinds of rights,¹¹⁸ which are only partially

117. See Website for the Mining Industry, Argyle Diamond Mine, Australia, available at <http://www.mining-technology.com/projects/argyle/> (containing photographs of the mine and its operations in West Australia) (last visited Nov. 29, 2003).

118. See generally *Western Australia v. Ward* (2002) 191 ALR 1; see also Cynthia Banham & Daniel Lewis, *Aborigines Lose Claim to Mine Land*, SYDNEY MORNING HERALD, Aug. 9, 2002, available at <http://www.smh.com.au/articles/2002/08/08/1028157991715.html> (last visited Oct. 29, 2003).

extinguished to the extent that the rights contained in the lease are not inconsistent with Native Title rights.

With particular regards to minerals and ores (under which diamonds are conclusively subsumed), the court held that different leases covered different substances, with Western Australia statutes granting all in situ mineral rights exclusively to the Crown and New South Wales statutes only covering coal. Native Title Rights generally exist to the surface of any ores and only cover ores (and explicitly not minerals, as discussed *infra*) underneath the surface if it can be clearly illustrated that some "tradition" exists involving the use of the ores. However, this tradition cannot be assessed simply and can be potentially subjected to an array of complex assessments.¹¹⁹ Finally, the Court held that all leases extinguish the exclusive right to fish in tidal waters and all "perpetual" leases¹²⁰ serve to extinguish Native Title.¹²¹ The latter holding was highlighted by Mal Peters, the President of the New South Wales Farming Association, as giving "land-holders greater security so they can borrow and invest for the future."¹²²

Second, with regards to certain rights and interests, the Court held first that there can never be a Native Title right to, or interest in, any mineral or petroleum. If any rights to minerals or petroleum ever existed in Western Australia, they would have been completely extinguished by legislation in the Western Australia Land Act of 1898. This conclusively ensured that the Argyle Mine, and any future

119. See generally *Ward*, 191 ALR at 1. However, Australia ultimately can be deemed to give Native Peoples far more respect than the United States, in which cultural and religious practices can be interpreted as derided by Sandra Day O'Connor in *Lyng v. N.W. Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988), stating that "no disrespect for [Indian religious practices] is implied when one noted that such beliefs could easily require *de facto* ownership of . . . spacious tracts of public property" and "whatever rights the Indians may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land"; see also Tarlock, *supra* note 76, at 12 n.33. However, the arguments by Jennifer Clark, commenting on *Ward*, that "spirituality alone *may* connect people to land even when they can't prove recent presence on it, but spirituality alone is unlikely to generate recognizable rights." Jennifer Clarke, *Recent Native Title Decisions in the High Court*, ANU Faculty of Law Reflection Paper, Aug. 12, 2002, at http://www.onlineopinion.com.au/2002/Sep02/Clarke_J.htm (last visited Oct. 31, 2003) (emphasis added).

120. See Western Lands Act, 1901 (Austl.)

121. See Clarke, *supra* note 119 (commenting that Perpetual Leases are essentially the "evolutionary successors of a type of freehold title granted by early New South Wales governors, for which the holders paid 'rent' and kept convicts").

122. Banham & Lewis, *supra* note 118.

oil wells, were in safe and secure hands (i.e., not the Native Peoples'). In contrast, Native Title rights and interests which exist, and are reiterated and protected in the NTA (as amended by the NTAA), are those in relation to land or waters where the Native Peoples have a connection¹²³ through traditional laws and customs. Claims for protection of cultural knowledge, which go beyond denial or control of access to land or waters, are not protected.

Justice McHugh, recognizing the import of all the Court's holdings, openly recognized the position in which these holdings placed Australia's Native Peoples by writing:

The dispossession of the Aboriginal peoples from their lands was a great wrong. Many people believe that those of us who are the beneficiaries of that wrong have a moral responsibility to redress it to the extent that it can be redressed. But it is becoming increasingly clear . . . that redress cannot be achieved by a system that depends on evaluating the competing legal rights of landholders and native-title holders. The deck is stacked against the native-title holders whose fragile rights must give way to the superior rights of the landholders whenever the two classes of rights conflict.¹²⁴

In essence, the Court's ruling ensured that no land would be available for Native Title from which Native Peoples could either (a) profit from natural resources or (b) subsume control of in any populated state (e.g., New South Wales and Victoria).¹²⁵ The fact that *Ward* and *Wilson* were not "decisions" in the extent to which they remanded the cases to lower courts to come to findings consistent with the opinions left little cause for optimism. The Court's tone was stark and bleak, with little room to maneuver.

The main problem with *Ward* and *Wilson*, notwithstanding the former's blatant obsequiousness with diamond dealers, is that they

123. See *Ward*, 191 ALR at 193-94 (discussing how "connection" with the land requires "at least physical presence").

124. *Id.* at 163.

125. Darren Fooks, Native Title Activist, *quoted by* Jim Dickins, *Native Title Failure*, HERALD SUN-MELBOURNE, Aug. 9, 2002, at 17, available at <http://www.information.com.au/news/02/08/article7696.asp> (last visited Oct. 29, 2003). However, the fact that *Ward* has not stopped Native Title from being granted. In fact, on September 27, 2002, less than two months after *Ward* and *Wilson*, the Martu people had 136,000 km² area of Western Desert recognized—though the key word highlighted by critics was "desert." National Native Title Tribunal, *WA's Martu People Achieve Native Title Recognition in Western Desert*, Sept. 27, 2002, available at http://www.nntt.gov.au/media/1033720087_2600.html (last visited Oct. 29, 2003).

struggle to come to terms with Native Title by embracing a concept of a "bundle of rights" which is inherently amorphous. The Court is forced to define interests in such a way that Native Peoples' true interests are left up to the whims of individual judges and interest groups. Indeed, the "bundle" idea, not surprisingly, originated in *Mabo*¹²⁶ with Justice Toohey.¹²⁷ *Ward* embraced this idea, as it gave the Court a means of more finely defining Native Title rights and interests via discrete pieces while appearing to extend and strengthen *Mabo's* holding. Chief Justice Gleeson, and Justices Gaudon, Gummow, and Hayne write tellingly in *Ward*:

Reference was made in *Mabo* to the inherent fragility of native title . . . found in [the] core concept of a *right to be asked [for] permission [to enter onto land] and to speak for [a] country*. The assertion of sovereignty [by Britain] marked the imposition of a *new* source of authority over the land. Upon that authority being exercised . . . the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded. But because native title is *more* than the right to be asked for permission to use or have access (important though that right undoubtedly is) there are *other rights and interests* which must be considered, including *rights and interests in the use of the land*.¹²⁸

Therefore, in *Ward* the Court attempted a quasi-slight of hand in holding that (a) *Mabo's* holding was limited, (b) *Ward* sought to extend the holding, and (c) by reiterating the times when Native Title

126. The idea "originated" in *Mabo* in the sense that *Mabo* is the precedent on which the Court bases its opinion in *Ward*. However, the concept of "bundles" of rights and duties vis-à-vis land rights in Australia has its origins in sources such as WESLEY HOFFELD, *FUNDAMENTAL LEGAL CONCEPTS AS APPLIED IN JUDICIAL REASONING AND OTHER LEGAL ESSAYS* (1923), and Antony Honore, *Ownership*, in *OXFORD ESSAYS IN JURISPRUDENCE: A COLLABORATIVE WORK* 107 (Anthony Guest ed., 1961), *construed in* Katy Barnett, *One Step Forward and Two Steps Back: Native Title and the Bundle of Rights Analysis*, 24 MELB. U. L. REV. 462, 469 n.87 (2000).

127. *Mabo v. Queensland [No 2]* (1992) 175 CLR 1 (emphasis added). Toohey J. wrote:

"Possession" is notoriously difficult to define . . . but for present purposes it may be said to be a conclusion of law defining the nature and status of a particular relationship of control by a person over land. "Title" is, in the present case, the *abstract bundle of rights* associated with that relationship of possession. Significantly, it is also used to describe the *group of rights* which result from possession but which survive its loss; this includes the right to possession.

Id.

128. *Ward*, 191 ALR at 44-45 (emphasis added).

was extinguished, elucidating all the "rights and interests in the use of the land" which were part of Native Title. Despite such metaphorical smoke and mirrors, Katy Bartnett, paraphrasing Beumont and von Doussa, notes how *Ward* ultimately recognizes that "Native Title is a right *different from and lesser than* any common law right," and, more importantly, "a *fragile divisible interest* which can be extinguished piece by piece."¹²⁹ Since the "bundle" does not include any spiritual rights or any rights that can be seen to be anything less than absolute, it is impossible to gain a realistic perspective of Native Peoples' interests or equate Native Peoples' interests with any "fundamental connection to the land itself."¹³⁰

The deficiencies of the "bundle" idea transcend the fact that it is simply too complex and fails to reflect the significance with which Native Peoples would like to be able to view Native Title. As Bartnett partially explicates, the "bundle" idea (a) fails as a "unified legal relation" (i.e., one does not fully know what it contains, though one can say one has it),¹³¹ (b) is a dangerously "disintegrated" approach to understanding something, which is best understood as a "whole"¹³² for Native Peoples, (c) is simply too malleable a concept for something so truly important to Native Peoples' identities,¹³³ and (d) bluntly illustrates an "illusion" of property which fails to accord with the stark reality of Native Peoples' understandings of the land.¹³⁴ Faced

129. Bartnett, *supra* note 126, at 463 (emphasis added).

130. See *Id.* at 467 n.58 (citing Justice North's justified frustration in *Ward* that extinguishing Native Title requires an "absolute inconsistency" between the "rights created and native title which is absolute, total, complete or fundamental," thus forcing one to ignore key requisites of Native Peoples' experiences of reality and their true relationship to the land over which they seek to claim Native Title in the first place).

131. See James Penner, *The Bundle of Rights Picture of Property*, 43 UCLA L. REV. 711, 712 (1996), construed in Bartnett, *supra* note 126, at 471 n.104.

132. See Thomas Grey, *The Disintegration of Property*, in PROPERTY 69, 74 (J. Roland Pennock & John Chapman eds., 1980), construed in Bartnett, *supra* note 126, at 472 n.117 (noting how the disintegrated view originated largely in the wake of Marxism and capitalist notions of the Division of Labor and property as entities which stem from one's labor and other aspects of one's work. Undoubtedly, these views contrast sharply with Native Peoples' views of the land as containing value independent of the labor they have "put into" it).

133. See Barry Hoffmaster, *Between the Sacred and the Profane: Bodies, Property, and Patents in the Moore Case*, 7 INTELL. PROP. J. 115, 128 (1992), construed in Barnett, *supra* note 126, at 472 n.120.

134. See Kevin Gray, *Property in Thin Air*, 50 CAMBRIDGE L.J. 252 (1991), construed in Barnett, *supra* note 126, at 473 n.124; see also Jacques Derrida, *Some Statements*

with this array of challenges illustrating the inappropriateness of envisaging property as a "bundle" of rights, and desiring to reflect the fact Native Title can have very real consequences on Native Peoples' lives, one is left with attempting to find ways to transcend *Ward's* and *Wilson's* limited cultural perspectives by overcoming their "piece-by-piece" extinguishments of Native Title. As discussed *infra*, the Canadian Supreme Court in *Delgamuukw*¹³⁵ expressly rejected the "bundle of rights" approach in favor of a "fundamental connection" assessment of Native Peoples and their land. This helped ensure there could be "no partial extinguishment of Native Title where the underlying connection with the land survives."¹³⁶

C. Ensuing Problems

The NTA (as amended by the NTAA), *Ward*, and *Wilson* all leave Native Peoples with little hope, and for good reason. The changes made by the NTAA to the NTA, described as a "worst case scenario for Australia's Indigenous People" by Rev. Peter Maher at the Pax Christi International Meeting in London before their adoption, ultimately made "no reference to the needs" of Native Peoples by denying them RTN. Thus, the changes made to the NTA threatened "the process of reconciliation" itself.¹³⁷ The principles of the NTAA, buttressed by the High Court's decisions in *Ward* and *Wilson*, ultimately "upgrades pastoral leases in a way never intended in the 150 year history of pastoral leaseholdings, it does this at the expense of Indigenous rights and at taxpayers' expense and it threatens to bring about environmental havoc because controls are limited on freehold land."¹³⁸ Commercial interests and lobby groups, as with *Ward* and *Wilson*, furthermore drove the NTAA, all but ignoring the "pluralism inherent in different indigenous claims to land."¹³⁹ After the initial passage of the NTA, Michael Dodson, the first ATSIC Commissioner, noted that "the true test" of the NTA's success was to be measured in the "degree to which it protects the human rights of Aboriginal and Torres Strait

and Truisms about Neologisms, Newisms, Postisms, Parasitisms, and other small Seismisms, in *THE STATES OF THEORY* 63 (1989).

135. See generally *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

136. Barnett, *supra* note 126, at 465.

137. Rev. Peter Maher, Address at the Pax Christi International Meeting (July 18, 1997), available at <http://www.paxchristi.net/PDF/RM08E97.pdf> (last visited Oct. 27, 2003).

138. *Id.*

139. *Id.*

Islander people.”¹⁴⁰ While freehold grants have been convenient in the degree to which they have completely extinguished Native Title claims, however, the desire to use them and increasingly create them is disheartening. The High Court’s assessments of leasehold lands, as illustrated in *Ward* and *Wilson*, have resulted from the irrational constraints of the Numerus Clausus principle¹⁴¹ instead of more justified, enduring rationales. There is no implicit reason why Native Title should coexist or be extinguished either more or less fluidly by certain types of leases. Rather, the Court seems only to want to force a uniquely shaped peg into pre-existing holes, ignoring something more fundamental and enduring about what Native Title means and, more significantly, what it signifies: a dream of Native Sovereignty in its purest form.¹⁴²

IV. ALTERNATIVE APPROACHES & ACHIEVING TRUE RECONCILIATION

Parts II and III illustrated the degree to which *Mabo*’s concept of Native Title has failed to live up to its promise, largely stemming from the fact that it was ill-defined and consequently failed to accommodate Native Peoples’ needs. Further problems with the way Native Title has been subsequently formulated, such as: (a) including a “bundle” of rights, (b) lacking a durable set of rationales governing when title is extinguished by leaseholds, and (c) appearing to be inconsistently determined (e.g., *mare nullius*’ endurance despite *terra nullius*’ extinction), leaves one wondering how to best protect what remains.¹⁴³ The current risk of State legislation converting huge amounts of land to freehold is real because it would forever extinguish the rights of Native Peoples to enjoy the benefits of Native Title. The

140. MICHAEL DODSON, NATIVE TITLE REPORT: JANUARY-JUNE 1994 (1995), available at http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/ntreport_1994/ (last visited Oct. 27, 2003).

141. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: the Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (discussing the limitations of the Numerus Clausus principle).

142. See Henry Reynolds, *After Mabo, What About Aboriginal Sovereignty?*, Australian Human. Rev., Apr. 1996, at <http://www.lib.latrobe.edu.au/AHR/archive/Issue-April-1996/Reynolds.html> (last visited Oct. 27, 2003), discussed in greater detail *infra*.

143. See WILLIAM JONAS, NATIVE TITLE REPORT: 2000 4 (2001); see also William Jonas, *2000 Native Title Report Summary*, Human Rights & Equal Employment Opportunity Commission Article Series, available at http://www.hreoc.gov.au/social_justice/native_title/nt2000_report.html (last visited Oct. 27, 2003) [hereinafter *2000 Summary*].

need to invalidate the distinctions between freehold and leasehold lands vis-à-vis Native Title must occur if the deep "spiritual relationship between Indigenous People and their land"¹⁴⁴ can be fully recognized.

To date, legislative acts and judicial rulings have been unable to make the necessary accommodations that Native Title requires for Native Peoples. The NTA has failed to protect Native Peoples' heritage, viewing it as a relic instead of a living, breathing artifact with its locus in the land. The Courts, similarly, seem unable to recognize the spiritual connections existing between Native People and the land (or the sea).¹⁴⁵ This was illustrated most recently in the Croker Island Case, in which the court held that Native Title could exist in relation to a seabed but that this conferred no exclusivity on Native claimants.¹⁴⁶ In this way, the judicial branch appeared unable to expand beyond its self-imposed confines of Anglo-American traditions, which lack the flexibility Native Peoples and Native Title demand and deserve. Ultimately, when pushed, the uncertain property interests of non-Native Peoples always trumps,¹⁴⁷ as illustrated in The Land (Titles and Traditional Usage) Bill of 1993 (WA) which attempted to homogenize Native Title claims by focusing only on the use to which lands are put. It failed to see how Native Peoples' interests and values were not analogous to freehold rights;¹⁴⁸ viewing them as a "license" would have made more sense, though this option was never considered.

These challenges require the law to turn to other extrinsic principles; only then can it evolve. Christopher Shanahan argues that the theoretical problem is largely one of a "dialectic tension" between (a) "internal pluralism," evinced by legislative acts designed to clarify the relationships among members of a well defined polity, and (b) "external pluralism," implied by a Native Title right which transcends the polity, but must coexist with it.¹⁴⁹ The ultimate question of which takes precedence renders the entire system lifeless, since any legislation must deny Native Peoples of their rights due to the fact

144. 2000 Summary, *supra* note 143.

145. *See id.*

146. *Commonwealth of Australia v. Yarmirr* (2001) 184 ALR 113.

147. DODSON, *supra* note 140, at 11.

148. *See generally* Christopher Shanahan, *Legislative Responses to Mabo: Rendering the Law Unconscious*, 2 MURDOCH U. ELECTRONIC J. OF L. 1, 12 (1995), available at <http://www.murdoch.edu.au/elaw/issues/v2n1/shanahan21.html> (last visited Oct. 27, 2003).

149. *Id.*

that the legislation cannot theoretically meet the needs of external constituencies.

On a less theoretical level, principles clearly do exist, and have been widely disseminated, by international bodies such as the United Nations. For instance, the UN Committee on the Elimination of Racial Discrimination (CERD) openly criticized the NTAA's elimination of the RTN¹⁵⁰ because the state did not obtain the informed consent of Native Peoples before altering the management of any of their potential lands.¹⁵¹ The International Convention on the Elimination of All Forms of Discrimination requires such consent¹⁵² and the International Covenant on Civil and Political Rights carries similarly significant obligations.¹⁵³ Furthermore, there are other major domestic challenges that need to be wrestled with, such as re-conceiving "equality" by understanding fully that "equality does not mean treating Indigenous People the same as non-Indigenous people. Native title is a unique interest in land that can only be enjoyed by

150. See *Report of Committee on the Elimination of Racial Discrimination*, General Recommendation XXIII Indigenous Peoples, 51st Sess., U.N. Doc. A/52/18, Annex V (1997), available at <http://www1.umn.edu/humanrts/gencomm/genrexxiii.htm> (last visited Oct. 27, 2003).

151. See Triggs, *supra* note 95.

152. Convention on Elimination of Discrimination, *supra* note 22, Article 5 (addressing the land rights of Native Peoples) of the Convention carries significant import here, reading as follows:

States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of . . .

(c) Political rights, in particular . . . to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

Id.

153. *International Covenant on Civil and Political Rights*, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966). Articles 1 and 27 (summarizing key obligations of signatory states) carry significant import here:

Art. 1 (3). The States Parties to the present Covenant . . . shall promote the realization of the right of self-determination, and shall respect that right

Art. 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

Id. art. 1, 27.

Indigenous People. Equality requires that this unique interest be given equal protection to that extended to non-Indigenous interests in land."¹⁵⁴

Ultimately, one thing is certain: the construction of Native Title at common law will determine whether Native Title can withstand non-Native interests. As stark as it sounds, either Native Title will come to be realized in its fullest capacity or Native Peoples and their cultures will cease to be.

A. Native Peoples' Understandings of the Land

The first step in "enabling" the common law to "understand" and "embrace" Native interests in Native Title is defining what these interests are. For non-Natives, who may have had few experiences with Native traditions, customs, and practices, defining these interests may be difficult. For these purposes, it is worthwhile considering the ways in which Australian Native Peoples' perceptions, approaches, and relationships with the land can be generalized. While the comments below do not purport to represent a comprehensive account of such principles, they provide a base from which one can begin to derive legal principles to bridge the gaps between Native and non-Native Peoples which have fuelled the disintegration of Native Title since *Mabo* and are preventing it from achieving its potential.

W.E.H. Stanner, an anthropologist who sought to explain to non-Native Australians how Australian Native Peoples viewed the land, wrote:

There are no English words good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home', warm and suggesting though it be, does not match the Aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre', and much else all in one. Our word 'land' is too sparse and meagre. We can scarcely use it except with economic overtures unless we happen to be poets I have seen an Aboriginal embrace the earth he walked on [The Western] tradition leaves us tongueless and earless towards this other world of meaning and significance.¹⁵⁵

154. 2000 Summary, *supra* note 143.

155. W.E.H. Stanner, *Aboriginal Territorial Organization: Estate, Range, Domain, and Regime*, 36 OCEANA 1 (1965), quoted by P. NATHAN & D. L. JAPANANGKA, SETTLE DOWN COUNTRY 11 (1983) [hereinafter SETTLE DOWN COUNTRY], construed in

Stanner's words are directly echoed by those of Christopher Cunneen and Terry Libesman, who comment that the "meaning of the land" for Australian Native Peoples is "sophisticated" and that "traditional understandings . . . are too subtle and complex" for an outsider to claim to understand or, at the very least, describe.¹⁵⁶ P. Nathan and D. L. Japanangka are less pessimistic, noting that land among Native Peoples "constitutes the essence of life," which is something, at least in its import, everyone can understand.¹⁵⁷

Two challenges faced by non-Native peoples attempting to understand Australian Native Peoples' approaches to land revolve around ownership and authority. These concepts are divorced from one another in Native Peoples' understanding of their relationship with the earth. In the Anglo-American tradition, ownership of land in fee simple is basically synonymous with occupation and control: that is, if one sets oneself on a piece of land and remains present on the land, then one owns it and can do with it what one pleases within certain guidelines. In this way, both ownership and authority are indelibly linked and mutually reinforcing. Without ownership, one cannot have authority; and without any authority, one cannot have ownership. By contrast, for Native Peoples the two may be related though not necessarily linked. The ways Native Peoples see "ownership" and "authority" differ markedly from their non-Native counterparts.

The concept of "ownership" for Native Peoples is probably best described as a "very deep connection," though these words fail to capture the essence of Native Peoples deep spiritual and emotive connection to the land. This deep connection is evident in Native Peoples' cultural heritage, which is expressed in depictions of "events from an ancestral past," known as Dreamtime, "preserved in tribal lore and periodically recreated . . . [including] each community's oral history, the details of certain rituals and ceremonies, the music and dance sequences used at gatherings, and even knowledge of the natural environment inhabited by the community."¹⁵⁸ The spirits who inhabited Dreamtime are those from whom all Native Peoples descend and with whom all Native Peoples are related. And in

CHRISTOPHER CUNNEEN & TERRY LIBESMAN, *INDIGENOUS PEOPLE AND THE LAW IN AUSTRALIA* 102-03 (1995) [hereinafter IPLA].

156. IPLA, *supra* note 155, at 102.

157. *Id.* at 102-03.

158. Jill McKeough & Andrew Stewart, *Intellectual Property and the Dreaming, in INDIGENOUS AUSTRALIANS AND THE LAW* 53 (1997).

determining the spirits with whom Native Peoples are linked, Native Peoples turn to their respective families and larger communities from whom they learn songs, which trace this lineage. It is these songs, through which Native Peoples are able to discover their lineage in Dreamtime, which are inherently linked to the land. Moreover, it is these songs, which are mapped through physical space by "Songlines,"¹⁵⁹ tracing and racing through the land, which enable Native Peoples to understand fully their identities and origins.

For all intents and purposes non-Native Peoples can probably best view Songlines as the marks of Native Peoples' property and "ownership." Indeed, just as non-Native Peoples employ surveyors to confirm boundaries and cartographers to draw maps, Native Peoples sing and share songs that depict and express the routes of Dreamings during Dreamtime and confirm the locations of their respective identities. Unlike non-Native Peoples' property rights, which are largely frozen in time, Songlines can shift depending on changes in the landscape. Furthermore, unlike non-Native Peoples' seemingly incessant focus on associating individuals with specifically mapped areas, Native Peoples jointly share and embrace Songlines and Dreamings communally. Just as blood-relatives are connected through distant familial ties, Native Peoples are connected through intersecting Songlines that mirror their familial ties.¹⁶⁰ In a given "piece" of land, there can also exist an innumerable number of Songlines associated with just as many Dreamings extending over vast distances.¹⁶¹ Therefore, the whole Australian continent can be

159. See Richard Moyle, *Songs, Ceremonies, and Sites: The Agharringa Case, in* ABORIGINES, LAND AND LAND RIGHTS 66 (1983) [hereinafter ABORIGINE LAND RIGHTS] (detailing the types and natures of Songlines); see also BRUCE CHATWIN, *THE SONGLINES* (1987) [hereinafter THE SONGLINES] (describing his factual quest to understand the significant, meaning, and import of Songlines in Native Peoples' communities); see also MUDROOROO NYOONGAH, *US MOB: HISTORY, CULTURE, STRUGGLE: AN INTRODUCTION TO INDIGENOUS AUSTRALIA* 175-92 (1995) (describing eloquently how the history of Australian Native Peoples cannot be written into a "dry narrative of a history text").

160. See PETER SUTTON, *NATIVE TITLE AND THE DESCENT OF RIGHTS* (1998) (noting how kinship ties are a key to ensuring that connectedness among Native Peoples remains intact over time); see also WARREN SHAPIRO, *SOCIAL ORGANIZATION IN ABORIGINAL AUSTRALIA* (1979) (discussing how residence groups, matrilineal ties, moiety systems, semi-moiety organizations, and conjugal bonds tie members of various groups of Australian Native Peoples together).

161. See THE SONGLINES, *supra* note 159, at 106-08 (containing both a Dreaming narrative and describing the use of song and Songlines which "transmit" the narrative across the Australian continent).

"owned" by potentially innumerable Native Peoples.¹⁶² In these ways, the Songlines reflect Native Peoples' indelible links with the land, which transcend the rigid lines of cartographic representations of the earth.¹⁶³

Non-Native peoples are often surprised to learn that while Native Peoples know their Songlines and can easily follow them (e.g., in migrating to new places across Australia's vast expanse),¹⁶⁴ they do not have authority over them. In other words, their ability to sing the songs to transfer the knowledge of the Songlines and Dreamings to others is controlled by individuals with different Songlines and Dreamings. Thus, Native Peoples have Songlines and Dreamings which differ from the Songlines and Dreamings they control. This apparently bifurcated system of "ownership" and "ceremonial authority"¹⁶⁵ is functionally equivalent to a trusteeship with one party having complete authority over resources owned by another party. One can also envisage this conjoint relationship as mirroring joint sovereignty¹⁶⁶ of more than one people over "the land," in which various Native Peoples are involved in sharing, holding responsibility for, and maintaining authority over individual "pieces" of land.

Understanding these relationships has proved very difficult for legal practitioners. In a land case involving the Yirrkala people,

162. See Robert Layton, *Ambilineal Descent and Traditional Pitjantjatjara Rights to Land*, in ABORIGINES, LAND, AND LAND RIGHTS 12, 17, fig.2 (Nicolas Peterson & Marcia Langton eds., 1983); see also Exhibit 12, noted in the Appendix (illustrating Songlines passing through areas of Central Australia).

163. See PETER READ, *BELONGING: AUSTRALIANS, PLACE AND ABORIGINAL OWNERSHIP* (2000); see also Nancy Williams, *Yolungu Concepts of Land Ownership*, in ABORIGINE LAND RIGHTS, *supra* note 159, at 94, 105 (detailing how Australian Native Peoples effectively (a) establish and recognize ownership under rights of title by Dreamings and Songlines which bestow land loci on named groups via patrilineal descent lines, (b) grant subsidiary rights based on intersections of Dreamings and Songlines, and (c) confirm rights of occupation on ownership and possession, though many of these rights transcend ownership and, as discussed in the paper *infra*, would be interpreted by non-Native Peoples as overriding the owners' rights—albeit these overrides are always associated with certain duties).

164. See Australia Surveying, *supra* note 16; see also Norman R. Tindale, Map of Aboriginal Tribal Boundaries, 1974, available at http://www.samuseum.sa.gov.au/tindale/boundaries_intro.htm (last visited Nov. 29, 2003) (illustrating the vastness of the Australian continent and Norman R. Tindale's groundbreaking work in the early 1970s illustrating that huge numbers of Native Peoples had lived there since time immemorial).

165. ABORIGINE LAND RIGHTS, *supra* note 159, at 73.

166. See Kingsley Palmer, *Migration and Rights to Land in the Pilbara*, in ABORIGINE LAND RIGHTS, *supra* note 159, at 172.

Milirrpum v. Nabalco Pty. Ltd. and the Commonwealth of Australia,¹⁶⁷ the solicitor for the defendants wanted to establish the rights of access between Moieties for the purpose of hunting. The State's cross-examination sought to confirm what rights were accorded to Milirrpum by questioning a Gumatj Person who often hunted on lands in which Yirritja People lived. The discussion proceeded as follows:

Milirrpum: If I go hunting by myself on [Y]irritja [moiety] land I ask first, except when I'm hunting with a [Y]irritja man then it's all right.

Solicitor: Well, when you go to Port Bradshaw [i.e., Yirritja territory] to hunt, do you ask anybody?

Milirrpum: We Rirratjingu people talk together and then we go.

Solicitor: Yes, but you *don't ask* any [Y]irritja people?

Milirrpum: The [Y]irritja people hear us [through the Songlines].

Solicitor: Yes, but you *don't ask them* if you can go there.

Milirrpum: No.

Solicitor: [So] if Munggurruwuy [a [Y]irritja man] goes to Dundas Point . . . [on your land] . . . does he ask your permission?

Milirrpum: He tell me, not asks

Solicitor: Does he ask your permission?

Milirrpum: He lets me know but he doesn't ask.

Solicitor (later): You would never say 'No' to Munggurruwuy . . . ?

Milirrpum: If there's no trouble, we would say 'Yes.'¹⁶⁸

In this short excerpt, one sees the challenges faced by Milirrpum to answer the Court's inquires, as well as the Court's inability to fully understand the dynamic between the Yirritja and Rirratjingu Peoples. It illustrates well the ways in which Songlines cross, "authority" over Songlines is held by those other than those who "own"

167. *Milirrpum*, (1971) 17 FLR 141; see also STEVEN L. DAVIS & JOHN ROBERT VICTOR PRESCOTT, ABORIGINAL FRONTIERS AND BOUNDARIES IN AUSTRALIA 53 (1992) [hereinafter ABORIGINAL FRONTIERS].

168. ABORIGINAL FRONTIERS, *supra* note 167, at 53 (emphasis added).

the Songlines, and the "intricate interconnections of all the activities of people in the area,"¹⁶⁹ such as in the Dundas Point region.

Native Peoples thus see land and land ownership very differently from non-Native Peoples. Interestingly, however, many Native Peoples lived on lands settled by non-Native Peoples largely without incident for most of Australia's modern history. With the mining boom and influx of foreign capital in the 1950s and 1960s, things changed. This second coming of whites to Australia resulted in the forced removal of Native Peoples and the "legal excision" of Native Peoples' lands from reserve areas. It consequently forced Native and non-Native Peoples to start discussing issues of land ownership in ways which had rarely occurred before.¹⁷⁰ The need for the two "sides" to come together and understand one another's points of view became increasingly important. Furthermore, the differences had ramifications that resulted in *Mabo*, as well as the NTA, NTAA, *Ward*, and *Wilson*. Only if non-Native Peoples begin to understand Native Peoples can the law, largely developed by the former, begin to assist and serve the latter.

B. Lessons from Awas Tingni

Better understanding how land is viewed by Native Peoples allows one to glean lessons from other jurisdictions addressing Aboriginal land claims. In this way, one can draw parallels and identify differences. Two of the most prominent cases in these regards are *Awes Tingni* and *Delgamuukw*, though there are notable examples of Native land management schemes in Norway, New Zealand, and the United Kingdom, as well. Each is considered in the succeeding section to illustrate more clearly both the errors in *Mabo* and how Australia's Native Peoples require a unique solution, which cannot easily be accomplished by simply morphing "fee simple" legal conceptions onto "Native Title" claims. Such morphing might work for some non-Australian native peoples who have relationships with their lands which more closely parallel non-Native schemes. But Australia's Native Peoples' situation, as the preceding discussion of Dreamings and Songlines illustrates, is quite different.

169. Maria Brandl & Michael Walsh, *Roots and Branches, or the Far-Flung Net of Aboriginal Relationships*, in *ABORIGINES LAND RIGHTS*, *supra* note 159, at 149-54 (1983).

170. IAN PALMER, *BUYING BACK THE LAND* 1 (1988).

In *Awas Tingni v. Nicaragua*,¹⁷¹ the *Awas Tingni* Indigenous Community successfully argued before the Inter-American Court on Human Rights that Nicaragua had breached its constitutional commitments by granting logging rights to a Korean Company on aboriginal *Awas Tingni* land which had been neither demarcated nor recognized by the state. In an unprecedented win for Native Peoples, the Court held against Nicaragua because it had denied the *Awas Tingni*'s collective rights to property and failed to provide the *Awas Tingni* People with both adequate judicial protection¹⁷² and equal protection under the law. The Court subsequently ordered Nicaragua to demarcate the traditional lands of the *Awas Tingni*, establish new legal mechanisms to demarcate the traditional lands of all indigenous communities in Nicaragua, and compensate the *Awas Tingni* accordingly.¹⁷³ The case was deemed "precedent setting"¹⁷⁴ and an "unprecedented legal victory for Indigenous peoples"¹⁷⁵ with "far reaching" implications¹⁷⁶ destined to carry significant "weight"¹⁷⁷ around the world. While it will be clear below that the extent of the *Awas Tingni*'s success may be limited to countries under the jurisdiction of the Inter-American Court and Native Peoples who display settlement characteristics which allow for a synonymous translation of traditional Native practices into easily recognizable black-letter property laws, the case was an extraordinary victory for Native Peoples. It also was symbolically significant since it was the

171. *Awas Tingni*, 79 Inter-Am. C.H.R. (ser. C) (2001).

172. *Id.* ¶ 134. The Court found that previous protections were "illusory and ineffective."

173. *Id.* ¶ 173.

174. *Court Tells Nicaragua to Pay Damages to Indians*, REUTERS NEWSWIRE, Sept. 18, 2001, available at http://www.indianlaw.org/body_awas_tingni_pr_reuters.htm (last visited Oct. 27, 2003).

175. Heloisa Griggs et al., *Amazon Alliance for Indigenous and Traditional Peoples of the Amazon Basin*, AMAZON UPDATE, Oct. 2001, at http://www.amazonalliance.org/update/2001/upd_oct01_en.htm (last visited Oct. 27, 2003).

176. Martin Edwin Andersen, *Thankful for Renewed Rights*, THE WASHINGTON TIMES, Nov. 22, 2001, available at http://www.indianlaw.org/body_awas_tingni_pr_wash_times.htm (last visited Oct. 27, 2003); see also Mariana Jimenez, *International Court Rules Against Nicaragua in Territorial Dispute with Indian Group*, AP WORLDSTREAM, Sept. 18, 2001, available at http://www.indianlaw.org/body_awas_tingni_pr_ap.htm (last visited Oct. 27, 2003).

177. Brian Stempeck, *Nicaragua: Rare Hemispheric Court Ruling Gives Land Back to Natives*, GREENWIRE, Sept. 21, 2001, available at http://www.indianlaw.org/body_awas_tingni_pr_greenwire.htm (last visited Oct. 27, 2003).

first time a Court with a wide-ranging jurisdiction had ever exercised its authority to recognize the aboriginal title of indigenous peoples.

Essentially, the Court recognized the Awas Tingni's rights in the areas of judicial protection,¹⁷⁸ property,¹⁷⁹ and remedies,¹⁸⁰ basing its findings on both the American Convention on Human Rights (ACHR)¹⁸¹ and the domestic Nicaraguan Constitution. While these findings were largely based on Anglo-American legal conceptions, they effectively address the Awas Tingni's situation. Article 21 of the ACHR, for example, states that "[e]veryone has the right to the use and enjoyment of his property." Furthermore, Article 21 states, "the law may *subordinate* such use and enjoyment *to the interest of society*."¹⁸² The Court thus employed the Anglo-American conception of land as something that is owned (as opposed to shared), albeit by an individual or group. This ensured that while the Court held in the Awas Tingni's favor, it expressly did not "support collective property rights, *per se*."¹⁸³ This approach found parallels in the Court's application of Articles 5 and 89 of the Nicaraguan Constitution, which read:

Article 5. [The State] recognizes the existence of the indigenous peoples who enjoy the rights, obligations and guarantees allocated in the Constitution, especially those that maintain and develop their identity and culture . . . so as to maintain the communal forms, enjoyment, use, and benefit of their lands.¹⁸⁴

Article 89. [The State] also recognizes the enjoyment, use and benefit of the waters and forests of their communal lands.¹⁸⁵

In its holding the Court thus viewed lands as clearly divisible, recognizing that while the community did not have any "real property title deed to the land it claim[ed],"¹⁸⁶ it deserved some title on the

178. See generally *Awas Tingni*, 79 Inter-Am. C.H.R. § VIII.

179. See *id.* § IX.

180. See *id.* § XI.

181. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR].

182. ACHR, *supra* note 181, art. 21 (emphasis added).

183. Ismene Zarifis, *News From the Inter-American System*, HUM. RTS. BR. (2002), available at <http://www.wcl.american.edu/hrbrief/09/2system.cfm> (last visited Oct. 27, 2003).

184. NICAR. CONST. art. 5.

185. NICAR. CONST. art. 89.

186. *Awas Tingni v. Nicaragua*, 79 Inter-Am. C.H.R. (ser. C) (2001), ¶ 103(g).

basis that its "activities"¹⁸⁷ were "carried out within a territorial space in accordance with a traditional collective form of organization."¹⁸⁸ Therefore, even though there were "overlaps"¹⁸⁹ of communal lands claimed by indigenous communities of the Atlantic Coast, the State could determine what land belonged to which groups.

This approach carries significant import in the degree to which it is limited to groups that, unlike Australia's Native Peoples, can be seen as geographically limited to defined spaces which lend themselves to an application of freehold title. The keys to the *Awas Tigni's* success were that the land had traditionally been *used* and *occupied* by the group,¹⁹⁰ Nicaragua itself had recognized the "communal property of indigenous peoples,"¹⁹¹ and the *Awas Tigni* could be easily seen to "have a communal property right to the lands they currently *inhabit*."¹⁹² This led to the soundness of the court's requirement for "demarcation" for the *Awas Tigni*, since if Nicaragua did not demarcate *Awas Tigni* lands, then their "territorial rights" would clearly have remained uncertain.¹⁹³ Obvious questions arise if one cannot clearly limit such rights if the "ownership" is marked by shifting reference points (e.g., Songlines), authority and control are not fully vested (e.g., Dreamings and Songlines are under the authority of individuals who do not "own" them), and individuals cannot "inhabit" the land by virtue of their lifestyles (e.g., hunter/gatherers) or geographic constraints (e.g., parched Central Australian deserts). In these regards, the legal arguments in favor of the *Awas Tigni* have no practical import for Australian Native Peoples, who cannot demonstrate clear control over specific pieces of land.

A closer look at the Court's holdings reinforces this pessimism vis-à-vis *Awas Tigni's* inapplicability to differentiate situated

187. *Id.* ¶ 103(e) (listing "family farming and communal agriculture, fruit gathering and medicinal plants, hunting and fishing" among the *Awas Tigni's* activities).

188. *Id.*

189. *Id.* ¶ 103(f).

190. Nicaraguan Indigenous Organizations, Communities, and Representatives, *Amicus brief for the Awas Tigni Mayagna (Sumo) Indigenous Community*, available at http://www.indianlaw.org/body_atintroeng.htm (last visited Oct. 27, 2003) (emphasis added).

191. *Awas Tigni*, 79 Inter-Am. C.H.R. ¶ 152.

192. *Id.* ¶ 153 (emphasis added).

193. Press Release, Indian Law Resource Center, Landmark Victory for Indians in International Human Rights Case Against Nicaragua (Sept. 18, 2001), available at http://www.indianlaw.org/body_iachr_decision.htm (last visited Oct. 27, 2003).

indigenous groups. First, the Court unanimously requests that Nicaragua abstain from any activities which might affect the "existence, value, use or enjoyment of the property *located in the geographic area where the members of the Awas Tingni Community live and carry out their activities*,"¹⁹⁴ underscoring the importance of the Awas Tingni residency in a clearly demarcated place.¹⁹⁵ Because the "lives of the members of the Awas Tingni community" relied "substantially on the agriculture, game, and fishing" that they carried out in "areas bordering their villages"¹⁹⁶ (i.e., anthropologists could freely enter the community and cite easily definable "territory" and "commons"), the Court was able to interpret conservatively Article 21 of the ACHR. The expert opinion by anthropologist and sociologist Rodolfo Gruenbaum¹⁹⁷ supports this conservative approach since it included few references about spiritually significant lands, which may change over time. He states "land is an essential tie which provides and maintains the cultural identity" of the Indigenous peoples in Nicaragua and is "part of a geographic and social, symbolic and religious space, with which the history and current dynamics of those people are linked."¹⁹⁸ However, he also notes how land is "not a mere instrument of agricultural production,"¹⁹⁹ suggesting that this criterion is the base from which the other conclusions stem. Remove the base, as in the case of Australian Native Peoples who did not pursue agriculture on Australia's desert plains,²⁰⁰ and one wonders

194. *Awas Tingni*, 79 Inter-Am. C.H.R. ¶ 173(4) (emphasis added).

195. See Danielle Knight, *Nicaragua Honors Court Ruling on Indigenous People*, INDIAN LAW NEWSWIRE, Feb. 25, 2002, available at http://www.indianlaw.org/body_awas_tingni_pr_ips2.htm (last visited Oct. 27, 2003) (media reports underscored the significance of demarcation, as well, partly due to its recognizable import to non-Native Peoples vis-à-vis clearly defined land rights); see also Danielle Knight, *Nicaraguan Tribe Sets Indigenous Rights Precedent*, IPS NEWS SERVICE, Sept. 19, 2002, available at <http://www.proutworld.org/news> (last visited Oct. 29, 2003).

196. Claudio Grossman, *Awas Tingni v. Nicaragua: A Landmark Case for the Inter-American System*, HUM. RTS. BR. (2001), available at <http://www.wcl.american.edu/hrbrief/08/3tingni.cfm> (last visited Oct. 27, 2003); see also Indian Law Resource Center, *Human Rights Court to Rule on Indian Land Rights Case Against the Government of Nicaragua*, APA NEWSLETTER, Feb. 4, 2000, available at <http://www.sdn.org.gy/apa/humanrightsnicaragua.htm> (last visited Oct. 27, 2003).

197. See *Awas Tingni*, 79 Inter-Am. C.H.R. ¶ 83(d).

198. *Id.*

199. *Id.*

200. See AUSTRALIAN BUREAU OF STATISTICS, *THE HEALTH AND WELFARE OF AUSTRALIA'S ABORIGINAL AND TORRES STRAIN ISLANDER PEOPLES: 2001 13-15* (2001), available at <http://www.aihw.gov.au/publications/iwh/hwaatsip01/hwaatsip01-c01.pdf>

whether their Native Title claims would still have any "bite" under the *Awas Tingni* formulation.

On the other hand, the Court's holding lays out many key principles that, to the Court's credit, imply openness to new ideas that transcend traditional legal formulations. In its opinion, for example, the Court writes:

Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a *communitarian tradition* regarding a *communal form of collective property* of the land, in the sense that ownership of the land is not centered on an individual but rather on the *group and its community*. Indigenous groups, by the fact of their very existence, have the *right to live freely* in their own territory; the *close ties* of indigenous people with the land must be recognized and understood as *the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival*. For indigenous communities, relations to the land are *not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations*.²⁰¹

In these regards, issues of "securing access,"²⁰² which would indeed apply to Australia's Native Peoples, would have import and assuredly be subsumed under a recognition of a group's need to uphold and strengthen their community. Second, the Court's focus that establishing an "effective mechanism for delimitation, demarcation, and titling" of the *Awas Tingni* land is to take place "*in accordance with their customary law, values, customs, and mores*"²⁰³ inevitably requires and encourages a certain degree of cooperation with the government. Both comprise key requisite steps towards any true form of reconciliation and understanding.

Awas Tingni has several other positive implications for Australian Native Peoples' quest for Native Title and true reconciliation. First, while the decision in *Awas Tingni* applies a paradigm of aboriginal land ownership which is limited by the requirement that land must be titled by Native Peoples, albeit

(last visited Nov. 29, 2003) (illustrating that the SATs with the largest proportion of Native Peoples—measured as a percent of the total population of the SATs—are in Australia's central regions).

201. *Awas Tingni*, 79 Inter-Am. C.H.R. ¶ 149 (emphasis added).

202. *Id.* ¶ 83(k).

203. *Id.* ¶ 173(3) (emphasis added).

communally owned,²⁰⁴ it reiterates key values which must ground any reconciliation agreements between Native and non-Native Australian Peoples. Indeed, the Court took the bold step of interpreting the ACHR as explicitly including "indigenous concepts."²⁰⁵ The Court also recognized the argument made by two amici that:

The intrinsic connections between land, environment, life, religion, identity, and culture, are so deeply rooted that it is not possible to provide an effective and adequate protection of a single right, such as the right to property, without considering other rights such as the right to life, identity, culture, and religion.²⁰⁶

These amici further highlight how the rights to property inherently intersect with the rights to a healthy environment,²⁰⁷ right to culture,²⁰⁸ and right to participate in government.²⁰⁹ Thus, there may be times when traditional legal approaches need to be reformulated to recognize "basic human rights,"²¹⁰ including: life; equality before the law; effective judicial remedies; residence and movement; religious freedom and worship; cultural benefits; self-determination; freedom from discrimination; health; clean environments; freedom from interference with one's home; minority rights; and identity rights.²¹¹ Surely, these formulations set standards that require and compel polities to find ways to recognize property that transcends a "ditch" or a "swath of jungle"²¹² as a dividing line. Australia's NTA therefore fails because it limits Native People's dignity.

204. Other "standard" forms of property formulations such as tenants in common, joint tenancies, tenancy by the entireties, and tenancies in partnership would also be permissible.

205. International Human Rights Law Group & the Center for International Environmental Law, *Brief of Amici Curiae for the Awas Tingni Mayagna (Sumo) Indigenous Community*, at <http://www.cedha.org.ar/docs/curiae1.htm> (last visited Oct. 27, 2003) [hereinafter IHRLG].

206. *Id.*

207. *Id.* at 11.

208. *Id.* at 15.

209. *Id.* at 17.

210. *Id.* at 6.

211. IHRLG, *supra* note 205, at 9.

212. Catherine Elton, *Indians' Heritage Gets Legal Stamp*, CHRISTIAN SCIENCE MONITOR NEWSWIRE (Boston), Dec. 4, 2001, available at http://www.indianlaw.org/body_awas_tingni_p_r_csmonitor.htm (last visited Oct. 29, 2003).

C. *Lessons from Delgamuukw*

Like *Awes Tingni*, Canada's *Delgamuukw* decision also addresses Native Peoples' rights and provides valuable insights into ways Australia should and could go about addressing Native Title and reconciliation issues with its Native Peoples. The fact that Canada, like Australia, shares close ties with Great Britain means Canadian court decisions carry additional weight in Australia's courts. Both countries are young, geographically large, economically developed, have very few people (compared to their landmasses),²¹³ and are facing the challenge of building multicultural identities and achieving reconciliation to varying extents with their respective Native Peoples. For example, on October 3, 2002, Philip Ruddock, then the Minister of Immigration and Multicultural and Indigenous Affairs and currently Attorney General of Australia, met with his Canadian counterpart Robert Nault in Canada to discuss ways the government can help Native Peoples address challenges in the health,²¹⁴ economic,²¹⁵ and social realms.²¹⁶ In Canada, like Australia, the fears of recognizing

213. Australia's Bureau of Statistics reported Australia's population at 19,764,613 as of 1:37 PM on Oct. 20, 2002, making it still the least densely populated country on earth. Australian Bureau of Statistics, *available at* www.abs.gov.au/Ausstats (last visited Dec. 1, 2003).

214. See AUSTRALIAN BUREAU OF STATISTICS, *supra* note 200, at 12; see also AUSTRALIAN INSTITUTE OF HEALTH AND WELFARE, *AUSTRALIA'S HEALTH: 1998* (Janette Whelan Publishing Consultancy ed., 1999) (illustrating that Australian Native People have higher mortality rates in rural areas corresponding to low life expectancies; significantly higher peri-natal deaths among Native Australian mothers than non-Native Australian mothers; smoking is higher among Native Peoples; and higher public health expenditures for Native Peoples than for others on a per capita basis); see also Exhibit 13 (containing a political cartoon (bottom right) portraying Native People's apparent suicides as actually stemming from a series of greater, more profound social ills); see also Adam Lamrozik, *The 'Free' Labour Market, Unemployment, and Crime*, in *CULTURES OF CRIME AND VIOLENCE* 196 (Judith Bessant et al. eds., 1995) (illustrating how Native Peoples comprise a disproportionate number of prisoners throughout Australia's states and territories); see also Peter Khoury, *Aborigines and the Politics of Alcohol*, in *AUSTRALIAN WELFARE: HISTORICAL SOCIOLOGY* 216 (Richard Kennedy ed., 1989) (discussing the effects of alcohol on Aboriginal communities).

215. See Australian Bureau of Statistics, *Australian Housing Survey, 1999*, *available at* <http://www.abs.gov.au/ausstats/abs@.nsf/0/53af1d370fc826feca256988007bf6a9?OpenDocument> (citing statistics which illustrate the effects of economic challenges faced by Australian Native Peoples) (last visited Nov. 29, 2003).

216. See *Australia, Canada compare notes on indigenous health, poverty*, ABC NEWS ONLINE, Oct. 3, 2002, at <http://abc.net.au/news/newsitems/s692009.htm> (last visited Nov. 6, 2003) (noting that even though Canada spends \$8 billion annually, its 1.4 million indigenous people "remain plagued by poverty, often-deplorable living

Native Title also hang “like a large, undefined cloud over title to land and resources”²¹⁷ In these regards, it is an understatement to refer to the “task of accommodating the rights of colonized peoples within a contemporary political and legal rights regime” as simply “demanding”;²¹⁸ it has been all consuming.

The historical context of *Delgamuukw* goes back to when British colonialists first entered into treaties with First Nation Peoples²¹⁹ in the early 1600s. On October 7, 1763, the British Crown acknowledged in a proclamation that it retained sovereignty of Canada’s indigenous peoples as “Nations” under the Crown’s protection. The treaty prevented the selling of any of the First Nation Lands to private interests and established a system for government acquisition of the lands, as needed. This was followed, from 1763-1850, by a period of land cessions from which reserves were created and native rights extinguished. Confederation in 1867 brought with it the British North America Act, giving the Federal Government exclusive responsibility for the lands.²²⁰ In 1888, the Canadian Supreme Court held in *St. Katherine’s Milling and Lumber Co. v. The Queen*,²²¹ that Indian Title existed after a Royal Proclamation in 1763. Claims processes were consequently implemented, though were of little use and ignored until 1973, when in *Calder v. Attorney Gen. of British Columbia*,²²² the Supreme Court of Canada decided that First Nation Peoples “have a legal and inherent right to lands where their title has been neither surrendered nor extinguished.”²²³ A new and

conditions, high rates of suicide and health problems”; this has led Canada to see the “plight of First Nations” as a “painful embarrassment” even though it is “widely considered to be one of the world’s most advanced countries.”).

217. Owen Lippert, *Delgamuukw Decision Will Create BC-style Aboriginal Land Claims Across Canada*, The Fraser Institute, Aug. 8, 2000, at http://oldfraser.lexi.net/media/media_releases/2000/20000808.html (last visited Oct. 29, 2003).

218. Catherine Bell, *Canadian Supreme Court: Delgamuukw v. British Columbia*, 37 I.L.M. 261, 261 (1998) (footnote omitted).

219. The term “First Nation Peoples” is used to describe Canada’s Native Peoples from this point forward, consistent with the use of the term “First Nations” in Canada as the homelands of Canada’s indigenous population.

220. COUNCIL FOR ABORIGINAL RECONCILIATION, MAKING THINGS RIGHT: RECONCILIATION AFTER THE HIGH COURT’S DECISION OF NATIVE TITLE 33-34 (1993), available at <http://www.austlii.edu.au/au/other/IndigLRes/car/1993/10> (last visited Oct. 29, 2003) [hereinafter MAKING THINGS RIGHT].

221. *St. Katherine’s Milling and Lumber Co.*, [1888] 14 App. Cas. 46.

222. *Calder*, [1973] 34 DLR 145.

223. Policy.ca, *First Nations*, at <http://www.policy.ca/bc/firstnations.htm> (last visited Oct. 30, 2003).

comprehensive land claims process was introduced, followed by a constitutional amendment in 1982 fully embodying aboriginal rights.²²⁴

The Gitskan and Wet'Suwet'En First Nation Peoples in British Columbia, asserting a joint claim for ownership and jurisdiction over certain lands, brought *Delgamuukw* before the Court in 1997.²²⁵ They also took issue with the trial judge's exclusion of historical and traditional oral evidence as inadmissible under the rules of evidence.

The Canadian Supreme Court's holding in *Delgamuukw* had five key parts, of which the first three find parallels in *Mabo* and its progeny and the latter two transcend Australia's current Native Title limitations. First, the Court in *Delgamuukw* found that Native Title was inalienable and could not be transferred, sold, or surrendered to anyone other than the Crown.²²⁶ Second, it held that all Native Title was held communally.²²⁷ Third, it upheld the common law standard of occupation as proof of possession;²²⁸ "the test for identification of Aboriginal Title" thus has the "requirement of occupancy"²²⁹ which requires exclusive occupation.²³⁰ The test does allow for the possibility of exclusive joint occupation of lands between two First Nations groups, but never three or more.²³¹ Fourth, the Court lambasted the trial judge for failing to accord due weight to oral testimony which formed the basis of the Gitskan and Wet'Suwet'En First Nations' claims. And fifth, and most tellingly, the Court widened the scope of Native Title by holding that exclusive Native Title rights to use land were not restricted only to the right to engage in activities which were aspects of "[aboriginal] practice[s], custom[s], and tradition[s] integral to . . . aboriginal culture."²³² Instead, the only limit was that the land

224. Constitution Act, 1982, pt. II, § 35(1).

225. Specifically, the case was brought on behalf of fifty-one hereditary chiefs of most houses of the Gitskan and Wet'Suwet'En First Nation Peoples regarding the ownership of 133 land parcels comprising 58,000 km². See Carrier Sekani Tribal Council, *Delgamuukw: A Summary of the Supreme Court of Canada Decision*, at http://www.cstc.bc.ca/pages/Treaty_delgmkwsmry.htm (last visited Oct. 30, 2003) [hereinafter Sekani Council]; British Columbia Treaty Commission, *A Lay Person's Guide to Delgamuukw*, at http://www.bctreaty.net/files_2/pdf_documents/delgamuukw.pdf (last visited Oct. 30, 2003).

226. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, ¶ 113.

227. *Id.* ¶ 114.

228. *Id.* ¶ 115.

229. *Id.* ¶ 142.

230. *Id.* ¶ 155.

231. *Id.* ¶ 196.

232. *Delgamuukw*, 3 S.C.R. ¶ 80.

could not be used in a manner which was irreconcilable with the nature of the claimants' attachments to the lands, thus opening the door for Native Title rights to encompass fully mineral rights and other exploitative uses which were clearly not "traditional uses" in any fair use of the term.

While *Delgamuukw's* holdings are not inapposite to Australia's current Native Title regime, they provide three key lessons, all of which Australia is well advised to heed if it is to achieve true reconciliation with its Native Peoples. Each is considered in turn.

Delgamuukw's first lesson is that negotiation is the key to reconciliation. Despite the fact *Delgamuukw* could be deemed a "win" for First Nation Peoples, the Supreme Court of Canada actually remanded the case back to the trial court and never decided if the land, in fact, was First Nation Land.²³³ Chief Justice Lamar writes in *Delgamuukw*, "it is through negotiated settlements, with good faith and give and take on all sides . . . that we will achieve . . . the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown."²³⁴ This is the only way to overcome seemingly "unsurmountable hurdles" in Native/Non-Native relations²³⁵ and avoids the dead-ends implied by injunctions and other litigious means.²³⁶ Australia could easily benefit from heeding this approach, especially given the degree to which it eschewed the RTN in the NTAA.

Delgamuukw's second lesson is that adequately addressing Native Title requires transcending apparent limitations, a lesson it

233. See Paul Tennant, *Life Goes On: First Nations and Municipalities After Delgamuukw*, Address to the Greater Vancouver Chapter of the Institute of Public Administration of Canada (Apr. 26, 1998), at <http://arcbc.tripod.com/delg-tennant.htm> (last visited Oct. 30, 2003).

234. *Delgamuukw*, 3 S.C.R. ¶ 186.

235. Melvin H. Smith, *The Delgamuukw Case: What Does it Mean and What Do We Do Now?*, The Fraser Institute, at http://oldfraser.lexi.net/publications/pps/10/s8_summary.html (last modified Aug. 23, 2000).

236. See J. L. Hunter, *Advancing Aboriginal Claims After Delgamuukw: The Role of the Injunction*, Presented at the Continuing Legal Education Conference on Litigating Aboriginal Title (June 2000) (on file with the author); see also Statement of the Relationship Between the White Mountain Apache Tribe and the U.S. Fish and Wildlife Service (USFWS), Dec. 6, 1994, noted in DAVID H. GETCHES ET AL., *CASES AND MATERIAL ON FEDERAL INDIAN LAW* 733-34 (4th ed. 1998) [hereinafter MFIL] (reflecting an agreement between the Native American Apache Tribe and an arm of the United States Government, the USFWS, in working to build an improved relationship and avoid legal haggling over implementing Federal environmental regulations on Native American Indian lands).

only partially embraces itself. The locus of this lesson is the degree to which the *Delgamuukw* court acknowledges the ability of First Nations to jointly occupy lands, suggesting that the seemingly stalwart requirement of exclusive occupation²³⁷ does not mean complete exclusivity.

The opinion also does not go far enough, limiting itself by explicitly excluding three or more groups from being able to share Native Title, apparently seeing such a move as too daring, if not unnecessary, given the nature of First Nation Peoples' claims. Surely, Australian Native Peoples' Songlines would necessitate a more comprehensive understanding of land rights since it is apparent that one could not attempt to address the needs of hundreds, if not thousands, of individual Native groups over 10,000 km² of desert.²³⁸ In response to this concern, the Court in *Delgamuukw* refers to "site-specific rights."²³⁹ However, this would be inapplicable in Australia due to the nature of Songlines. At the very least, the *Delgamuukw* court suggests that creative options could be attempted and one needs only the courage to try.

Finally, *Delgamuukw's* third lesson is that respecting Native Peoples' rights demands changing one's demands. Oral testimony must be admitted so that "co-equality" and "principles of diplomacy" are accorded to First Nation Peoples. Ensuring that oral histories of First Nation Peoples would never be "systematic[ally]"²⁴⁰ under-evaluated, the Court stated:

Notwithstanding the challenges created by the use of oral histories as proof of historical facts, the laws of evidence must be adapted in order that this type of evidence can be accommodated and placed on an equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents.²⁴¹

237. *Delgamuukw*, 3 S.C.R. ¶ 155.

238. See Tindale, *supra* note 164; see also JARED DIAMOND, GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES 311 (1997) (noting how "Aboriginal Australia consisted of a sea of very sparsely populated desert separating . . . ecological 'islands,' each of them holding only a fraction of the continent's population and with interactions attenuated by the intervening distance.").

239. *Delgamuukw*, 3 S.C.R. ¶ 138.

240. See Sekani Council, *supra* note 225; see also Brian Thom, *Aboriginal Rights and Title in Canada After Delgamuukw: Anthropological Perspectives*, at <http://home.istar.ca/~bthom/rights.htm> (last visited Oct. 30, 2003).

241. *Delgamuukw*, 3 S.C.R. ¶ 87.

One wonders in these respects if the Court's equating "sovereignty" with the "honour of the Crown"²⁴² could be implicitly extended to the "honour" of First Nation Peoples and Native Peoples in Australia.

These lessons enable one to begin forming a sense of an alternative, more complete Native Title regime in Australia. Such a regime would respect Native Peoples by enabling them to exercise their rights to self-determination over their traditional territories,²⁴³ which would be truly inalienable.²⁴⁴ Furthermore, it would be built on principles of negotiation instead of litigation, thus recognizing the import of dialogue and the importance of individuals working together to find solutions to their problems.²⁴⁵ Third, the regime would recognize the inherent "shared exclusivity"²⁴⁶ which is implied by Songlines and accommodates "non-exclusive Aboriginal rights"²⁴⁷ given the history of European and, more apt today, global settlement.²⁴⁸ This approach has its genesis in Justice Hucheon's comments that land should permit "a number of uses . . . if exclusivity cannot be proved" and the "common law should develop to recognize aboriginal rights as they were recognized by either *de facto practice* or *by aboriginal systems* of governance."²⁴⁹ In Australia, this implies a new regime which could accord with certain "inherent limit[s]" on lands that should not or cannot be "used in a manner that is irreconcilable with the nature of the . . . attachments to those lands."²⁵⁰ While the Court in *Delgamuukw* appears to hypocritically posit that Native Title is "not equated with fee simple ownership" and "cannot be described with reference to traditional property law

242. *Id.* ¶¶ 29, 35 & 203.

243. See James Tully, *The Panel on the Meaning of Aboriginal Title: Two Visions of Aboriginal Title and Reconciliation*, Aboriginal Rights Coalition of British Columbia, at <http://arcbc.tripod.com/delg1.htm> (last updated Apr. 13, 2002).

244. See Paul Joffe, *Assessing the Delgamuukw Principles: National Implications and Potential Effects in Quebec*, 45 MCGILL L.J. 155, 182-88 (2000).

245. This is not meant to sound trite, reflected in the Chief Justice's statement that "the Crown is under a moral if not a legal duty to enter into and conduct . . . negotiations" with Aboriginal peoples in "good faith." Wally Braul, *ARC Victoria's Interpretation of Delgamuukw*, Aboriginal Rights Coalition of British Columbia, at <http://arcbc.tripod.com/delg1.htm> (last updated Apr. 13, 2002).

246. *Delgamuukw*, 3 S.C.R. ¶ 158.

247. *Id.* ¶¶ 38, 47.

248. See Exhibit 14, noted in the Appendix (illustrating the diversity of countries from which Australians now come).

249. *Delgamuukw*, 3 S.C.R. ¶ 159 (emphasis added).

250. *Id.* ¶ 124.

concepts" because it is "personal" and "generally inalienable except to the Crown,"²⁵¹ the fact remains that the *Delgamuukw* Court requires Aboriginal societies to "specify the area that has been continuously used and occupied"²⁵² by identifying key boundaries.²⁵³ In any new Native Title regime in Australia, this restriction needs to be transcended. Only then can the import of Dreamings and Songlines be fully accorded their due.

*D. Lessons from Other Jurisdictions*²⁵⁴

Additional lessons informing an alternative approach to addressing Native Title in Australia can be gleaned from jurisdictions other than Canada and Nicaragua. Norway's approaches with the Sámi People, New Zealand's experiences with the Maori People, and the United Kingdom's management of its "public pathway" system throughout the United Kingdom each give one a sense of elements which other polities have considered in addressing their own indigenous needs. Each is considered in turn.

Norway's experiences with the Sámi People parallels Australia's challenges managing Native Title after *Mabo*, though Norway has more straightforwardly addressed key challenges.²⁵⁵ The Sámi are a

251. *Id.* ¶ 190.

252. *Id.* ¶ 195.

253. But consider the Court's recognizing that "occupancy" can refer to the "use of . . . even remote territories to pursue a traditional mode of life." *Id.* ¶ 199. In response, the fact remains that the land must still be firmly and solidly "bounded" subject to the constraints on joint "ownership."

254. Special thanks to Carol Rose, the Gordon Bradford Tweedy Professor of Law and Organization at the Yale Law School, for recommending an examination of (a) the Sámi in Norway and (b) the public footpaths in Britain for ideas which could be applied to managing Native Title in Australia.

255. Finland has also faced challenges in respecting the rights of Sámi People in its territory, as well, though its challenges have been minimized by the small number of Sámi in its territory (6,500) compared to Norway (45,000). Finland, for example, passed the Constitution Act of Finland (969/1995) recognizing the Sámi as an indigenous people with the right to use the Sámi language in any contracts with the government and, subject to the Parliament Act (1928/7 amended 1991/1079) to be heard in any Parliamentary proceedings addressing matters of consequence to them. On January 1, 1996, the Constitution Act (973/95) was amended to guarantee the Sámi cultural autonomy in the Sámi homelands (see § 51(a)) and the Decree of Sámi Parliament of 1973 was elevated to an Act of Parliament with the former Sámi Parliament officially renamed the Sámi Thing. See Elina Helander, *The Sámi of Norway*, at http://www.reisenett.no/norway/facts/culture_science/sami.html (last visited Oct. 18, 2003); see also United Nations High Commissioner for Human Rights, *Core Document Forming Part of the Reports of State Parties: Finland*,

Laplander Herdspeople who have practiced "reindeer pastoralism" for all of recorded history.²⁵⁶ For years, Norway's approach to the Sámi was largely ambiguous, "paying lip service" to their status as indigenous peoples and "avoiding the legal and political consequences" of any formal recognition.²⁵⁷ Matters dramatically changed with the (a) Reindeer Herding Act of 1971 (holding Sámi as "privileged reindeer herders" under all reindeer statutes (*rennäringslagen*)); (b) Taxed Mountains (*Skattefjällsmålet*) Case²⁵⁸ (affirming that the Sámi had a property "firm right of use" of the southern portion of the Taxed Mountains and might have complete ownership of more northern areas); (c) Sámi Act of 1987²⁵⁹ (establishing a Sámi Assembly with powers to discuss and make pronouncements on matters relevant to the Sámi People);²⁶⁰ and, most prominently, (d) Parliament's²⁶¹ ratification of a Constitutional amendment in 1988²⁶² which upheld Norway's responsibility of assisting the Sámi people.²⁶³ Therefore, for years the combination of "recognition and denial"²⁶⁴ which had existed was pushed aside in a series of steps which, at their core, not only recognized what the central government should give to the Sámi, but how it should interact with the Sámi given the Sámi's ability to govern themselves.

New Zealand's experience with the Maori People parallels Norway's recent approach toward the Sámi, though dates back to 1840. Partly a result of the Maori People's incredible resilience and

HRI/CORE/1/Add.59/Rev.2, (1998) at <http://www.unhchr.ch/tbs/doc.nsf/0/bcd32dcbe53c57198025668a003a7c42?OpenDocument> (last visited Oct. 30, 2003).

256. See An introduction to the Sami people, available at <http://www/itv.se/boreale/samieng1.htm> (last visited Nov. 29, 2003) (illustrating where the Sámi live); see also T. Brantenberg, *The End of Thirteen Years of Silence. The Sámi Land Rights Issue in Norway*, 4 IWGIA NEWSL. (Oct./Dec.).

257. Far Korsmo, *Swedish Policy and Saami Rights*, 11 THE N. REV. 32, 33 (1993).

258. *Skattefjällsmålet*, Nytt Juridiski Arkiv 1981: 1.

259. Sámi Act No. 56, 12 June 1987.

260. See United Nations High Committee on the Rights of the Child, 6th Sess., *Summary Record of the 150th Meeting: Norway*, CRC/C/SR.150, (1994), at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/e42f535e0cc6063b41256151003944af?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/e42f535e0cc6063b41256151003944af?OpenDocument) (last visited Oct. 30, 2003).

261. Also called the *Storting* (i.e., the National Assembly of Norway).

262. See NOR. CONST. art. 110(a) (stating "[i]t is the responsibility of the authorities of the State to create conditions enabling the Sámi people to preserve and develop its language, culture, and way of life."). *Id.*

263. The late King Olav V opened the Sámi Parliament, the Sameting, on Oct. 9, 1989.

264. Korsmo, *supra* note 257, at 33.

New Zealand's remote location, the British signed the Treaty of Waitangi with the Maori People on February 6, 1840. Under the Treaty, the Maori agreed to accept British sovereignty in return for full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties under the exercise of their own chieftainship (*te tino rangatiratanga*). While the New Zealand Parliament has never officially ratified the Treaty, the Treaty of Waitangi Act of 1975 firmly established the Waitangi Tribunal to ensure that Maori interests regarding any land claims were assessed fairly. Consisting of half-Maori and half-non-Maori People, and the Chief Judge of the Maori Land Court as Chair, the Tribunal meets at Marae²⁶⁵ to accommodate Maori claimants and discuss their grievances. Unlike Australia's Native Peoples, the Maori have traditional concepts of land which could be more easily morphed onto Anglo-American concepts, at least vis-à-vis geographic locations being firmly bounded and "dimensions" of the rights associated with land²⁶⁶ "owned" by individual actors.²⁶⁷ However, what is most telling in the New Zealand system is the high degree of respect it accords Maori People in resolving disputes. In this way, it reflects the spirit of Waitangi by treating the Maori People as full-fledged equals in government negotiations.

The implications of "equal treatment" are most readily apparent when land is simply "turned over" to Native Peoples who claim ownership. However, the case of Great Britain's management of public pathways illustrates how lands carrying significant cultural, historical, and symbolic import have been managed conjointly with more modern "fee simple" schemes. Indeed, the immense network of public pathways existing in Great Britain date back to at least the 9th and 10th Centuries when individuals needed ways to easily navigate the countryside. While many modern roads currently trace these age-old footpaths, many do not. This stems from the footpaths' often circuitous routes that traverse mountains, moors, heaths, and downs.

265. Traditional, communal meeting places for Maori Peoples.

266. Among the dimensions referenced are the right to use (a) certain parts of a land parcel (b) in certain ways (e.g., swimming in a given stream or sitting under a certain tree). These rights are divided in Maori traditions, though are clearly bounded in that they ascribe to a certain activities on certain pieces of land (e.g., swimming as opposed to catching fish in a certain stream, and sitting as opposed to climbing a certain tree).

267. Stuart Banner, *Two Properties, One Land: Law and Space in Nineteenth Century New Zealand*, 24 LAW & SOC. INQUIRY 807, 812-13 (1999), reprinted in PERSPECTIVES IN PROPERTY LAW 321 (Robert C. Ellickson et al. eds., 3rd ed. 2002).

Traditionally, the paths took the forms of "public rights of way" through private fee simple lands by inferred easements of the Crown. In 1949, the National Parks & Access to the Countryside Act (NPACA) sought to record and confirm the location of these public footpaths in the interest of "heritage" and in the face of "increasing urbanization and the intensification of agriculture."²⁶⁸ In other words, the Act recognized the value of a culturally important, land-based resource of Britain's Native Peoples that demanded attention—the footpaths—despite economic development and despite alternative uses of the land on which the footpaths were located. The "rights" of footpath users were clearly reiterated and defined,²⁶⁹ along with mechanisms available to fee simple owners who had issues with the footpaths' running through their territory (e.g., conflicts of use or nuisances).

The Countryside and Rights of Way Act (CRWA) of 2000 updated the 1949 Act by providing Local Councils with the powers to manage diversion, extinguishment, creation, and modification of the routes.²⁷⁰ Its goals were ensuring the "public's ability to enjoy the countryside whilst also providing safeguards for landowners and occupiers."²⁷¹ The Department of Environment, Food, and Rural Affairs (DEFRA) highlighted that the Act "will create a new statutory right of access and modernize the rights of way system as well as giving greater protection to Sites of Special Scientific Interest (SSSIs), providing better management arrangements for Areas of Outstanding Natural Beauty (AONBs) and strengthening wildlife enforcement legislation."²⁷² Like the NPACA, the CRWA codified the ways in

268. National Parks and Access to the Countryside Act, 1949, c. 97, § 5 (Eng.).

269. Three categories of path were defined in the Act: (a) footpaths (rights of way for pedestrians only), (b) bridleways (for horse-riders and cyclists), and (c) byways (i.e., roads used as public paths and typically old carriageways now used mainly by non-motorized traffic). Isle of Wight Council, *Council Duties in Relation to Public Rights of Way*, at http://www.iwight.com/living_here/getting_around/data/1-2/1-2a.htm (last visited Oct. 30, 2003).

270. Countryside and Rights of Way Act, 2000, c. 37, sched. 6 (Eng.). [hereinafter CRWA]; see also Karen Berger, *Birth of a Trail*, Camp the World, at <http://www.camptheworld.com/EUROPE.htm> (last visited Oct. 30, 2003) (writing how the "English have . . . ideas . . . that . . . [others] would be well to borrow, like their system of public footpaths, which pass by easement through private lands"). *Id.*

271. Department of Environment, Food, and Rural Affairs, *Countryside Legislation: Countryside and Rights of Way Act 2000: Fact Sheet, Fact Sheet 1: Overview*, at <http://www.defra.gov.uk/wildlife-countryside/cl/bill/factsheet/> (last visited Oct. 30, 2003).

272. *Id.*

which mandatory easements, directly under sovereign Crown control, were to exist throughout Britain in the interests of Britain's Native Peoples. In many cases, these rights were bridled: some footpaths, for example, were limited to foot traffic; others could be closed by landowners up to twenty-eight days each year for the landowners' personal uses with adequate public notice; and cultivated land could be exempted, if approved by the local Council.²⁷³ The footpaths, however, reflected the Sovereign's duty to respect Native heritage, trumping the authority of fee simple owners as needed.

E. An Alternative Approach: Conjoint Sovereignty with Mandated Easements

An alternative approach to Australia's current Native Title system requires overhauling the current system, though this need not be as radical as the word "overhaul" suggests. It would take to heart the very best lessons of *Awas Tingni*, *Delgamuukw*, and the dealings with the Sámi, Maori, and British peoples; and it would avoid the pitfalls. It would integrate principles of inclusion and respect for Native and non-Native Peoples alike, while according with key legal doctrines—though extending them, too. It would challenge individuals by forcing them to try something new, though it would have built-in control mechanisms to deal with inevitable frustrations. It would ensure that current, traditional arrangements are not threatened, allaying the fears of those wondering whether it would have negative results, though ensure that key issues currently ignored are addressed. It would also be the first step toward achieving reconciliation between Australia's Native and non-Native Peoples—a goal currently sought by Native Peoples around the globe. The approach would revolve around two key principles: conjoint sovereignty and mandated easements, both of which are discussed in greater detail *infra* after first clarifying what the term "reconciliation" truly means.

1. Defining True Reconciliation

Australian Native Peoples and government ministers alike have often deemed "reconciliation" as the ultimate end-point in Native/Non-Native relations, so it is assumably an implicit goal of any alternative approach to managing Native Title. Notably, however, "reconciliation" is only once mentioned in *Mabo*²⁷⁴ and not at all in

273. See CRWA, *supra* note 270, § 22(5).

274. See *Mabo v. Queensland* [No 2] (1992) 175 CLR 1.

Ward, suggesting that it has never been on the High Court's collective mind. Part of this stems from the fact that "reconciliation" is not a legal phrase and represents something that transcends the Court. Instead, "reconciliation" is a state of being which will have occurred when the challenges of Native/Non-Native relations in the present time fully and fundamentally address the mistakes of the past and a system is put in place which solidly ensures the basis of a productive, fruitful future relationship. Only then can one be assured that problems surrounding such issues as Native Title will be overcome.

The Council for Aboriginal Reconciliation has held that reconciliation "in the end" involves attaining a "situation . . . where [the] ancient, subtly creative Aboriginal culture exists in friendship alongside the non-Aboriginal culture" and becomes "a matter of pride not only for all Australians but for all humankind."²⁷⁵ The Council further notes how true reconciliation needs to transcend the law in that it will operate in "all sectors, public and private"²⁷⁶ and involves eight key elements:

- (1) [Achieving] a *greater understanding of the importance* of the land and sea in Aboriginal and Torres Strait Islander (ATSI) society;
- (2) [E]stablishing *better relationships* between Aboriginal and Torres Strait Islander Peoples and the wider community;
- (3) Recogni[zing] that Aboriginal and Torres Strait Islander *cultures are a valued part* of Australian heritage;
- (4) [Creating] a sense for all Australians of a *shared ownership* of their history;
- (5) [Ensuring] a *greater awareness of the causes of disadvantage* that prevent Aboriginal and Torres Strait Islander [P]eoples from achieving fair and proper standards in health, housing, employment, and education;
- (6) [Stimulating] a greater community response to *addressing the underlying causes* that currently give rise to the *unacceptably high levels of custody* for Aboriginal and Torres Strait Islander [P]eoples;

275. MAKING THINGS RIGHT, *supra* note 220, at 3.

276. *Id.* at 4.

(7) [C]reating greater opportunities for Aboriginal and Torres Strait Islander Peoples to *control their destinies*;

(8) Agree[ing] on whether the process of [R]econciliation would be advanced by a document of [R]econciliation.²⁷⁷

These, at the very least, require one to journey beyond the "path of least resistance"²⁷⁸ and establish new inroads both in the law and, more important, the implications of the law.²⁷⁹

2. Defining The Vision: Two Key Components & Five Affected Areas

An alternative approach to managing Native Title can help achieve these goals, inasmuch as it serves as a catalyst for other reconciliation efforts. As summarized in Exhibit 11,²⁸⁰ the approach imbues a fundamental respect of Native Peoples and Native Title by recognizing Native sovereignty over land conjointly with the Crown and ensures that the current non-Native systems of land ownership and lease guarantees are solidly maintained through a system of mandatory easements. These seemingly simple principles have profound consequences that cannot be completely and fully addressed here. However, there are five key areas that are affected and these areas deserve greater discussion. Ultimately, it is hoped that this framework will serve as a springboard for further discussions about better formulating Native Title, achieving reconciliation, and establishing the prerequisites for fulfilling *Mabo's* vision.

The first two areas affected are those of sovereignty and Native Title, which work in close tandem with one another. As noted above, the new approach to Native Title replaces the current system's reliance on one sovereign (i.e., the Crown) with that of two sovereigns, the Crown and Native Peoples. It is important to note that the two are seen as conjoint sovereigns specifically over land, meaning that they share sovereignty equally over property issues and that one

277. *Id.* at 2 (emphasis added).

278. KENNETH MADDOCK, ANTHROPOLOGY, LAW AND THE DEFINITION OF AUSTRALIAN ABORIGINAL RIGHTS TO LAND 185 (1980).

279. These eight goals illustrate the inevitability of ensuring that social relations (e.g., Native interests and non-Native interests), economic interests (e.g., who has control over land assets), and political systems (e.g., who has authority to make decisions) must all be addressed in ensuring true reconciliation.

280. Exhibit 11, *noted in* the Appendix (summarizing the five key areas and their effects under both the current Native Title regime and an alternative regime based on conjoint sovereignty with mandated easements).

cannot trump the other. The imports of this approach, which are most readily apparent in the effects on Native Title, are not that non-Native Title ceases to exist; but rather that Native Title is reformulated as something that is not necessarily fee simple (i.e., expunging all other claims) and cannot be expunged by other claims. Instead, Native Title is accorded its due by being fully non-expugnable, though then subject to the mandatory imposition of other land claims via mandatory easements backed by the Crown. In these regards Native Title is not something that is "given" to Native Peoples at the Crown's behest and beneficence, but something Native People deserve and retain by virtue of their inherent, original authority over the land. The Crown's sovereignty, however, has import in the extent to which it can impose its will on Native Title by ensuring that its claims, through its leases, carry full import while reflecting the interests of non-Native Peoples under its authority.

The third area is conflict and problem management, which the new system treats as an opportunity to build greater ties between Native and non-Native peoples rather than an impediment to be avoided. Unlike the current regime, which has sought to eliminate RTN in light of protracted zero-sum negotiations based on whether Native Peoples "get" Native Title, the new approach requires non-Native and Native Peoples to sit down together and negotiate how they will jointly manage their rights and responsibilities. Given the Crown's sovereignty, non-Native peoples can be rest assured that their core rights cannot be extinguished or eliminated by Native Title. On the other hand, Native Peoples have the authority to discuss the ways these rights are enacted or possibly waived in the Native Peoples' interests. This "give and take" would be subjected to ADR methods, resulting in mandatory arbitration, if necessary. This approach is far superior to the current system which pits Natives versus non-Natives in a seemingly never ending battle. In these ways, the imports of leases and the mandated easements would not necessarily imply the results of *Strate v. A-1 Contractors*²⁸¹ in the United States, in which a local Indian Tribe's granting an easement to the States for a road is assumed to eliminate the Tribe's jurisdiction over the road (i.e., making it "alienated, non-Indian land")²⁸² for

281. *Strate*, 520 U.S. 438 (1997).

282. *Id.* at 454; *see also* at 440 (discussing the other instances in which the court has considered how other easements, for "non member governance purposes" can also be considered alienated, non-Indian land).

"nonmember governance purposes."²⁸³ Once Native Peoples' sovereignty is recognized, jurisdiction, even in the face of mandated leases, does not "shut out" Native Peoples from having a say in the ways in which both their needs and the needs of non-Native leaseholders can be jointly addressed and recognized.

The fourth and fifth areas affected by the new approach address the security of leases with mandated easements, allaying the fears of non-Native Peoples who perceive that conjoint sovereignty over the land implies ceding power and authority instead of sharing power and authority. In essence, the current system allows the Crown to grant leases which can be used to extinguish Native Title, rendering moot the concept of Native Title. Conversely, the alternative approach codifies and guarantees lease rights under the aegis of a system that superimposes them on Native Title lands. Non-Native Peoples can therefore be fundamentally assured of their ability to rely on the terms of their leases. Similarly, Native Peoples can rely on the fact that they will be able to discuss and address their needs, which in most cases can likely coexist with the leaseholders. As the third area discussed *supra* makes clear, however, ADR methods will be solidly in place to ensure that disputed issues are worked out in the most amicable way possible. Again, avoiding situations that lend themselves to creating only winners and losers defeats the purpose of any scheme that has reconciliation as an ultimate goal. The following sections shed additional light on the each of these five areas.

3. Areas 1 & 2: Sovereignty and Native Title

The import of conjoint sovereignty in the new approach to conceiving Native Title cannot be understated. Economists and legal theoreticians alike have echoed discussions about sovereignty and its importance in the affairs of all Peoples, especially Native Peoples.²⁸⁴ In *Mabo*, the import of sovereignty was essential in confirming the "radical" title off of which the Native Title was based. In its opinion, the Court notes that on annexation, the Crown's sovereignty enabled it to achieve:

tenure and a concomitant of sovereignty. As a sovereign enjoys supreme legal authority in and over a territory, the sovereign has power to prescribe what parcels of land and what interests in those

283. *Id.*

284. See Stephen Cornell, *Sovereignty, Prosperity and Policy in Indian Country Today*, 5 COMMUNITY REINVESTMENT 5 (1997), reprinted in MFIL, *supra* note 236, at 721-28 (referring to a "nation building concept" for economic development).

parcels should be enjoyed by others and what parcels of land should be kept as the sovereign's beneficial demesne.²⁸⁵

The Court thus described the nature of a "pure legal estate to which beneficial rights may or may not be attached" at the behest of the Sovereign.²⁸⁶ In this way, the aboriginal title continued as a burden on the Crown's radical title.²⁸⁷ Because Native Sovereignty would conjointly exist with Crown Sovereignty in the new approach, however, Native Title has no burden and thus no extinguishing effects on Crown Title which would now be free of the need for reversion.²⁸⁸

In these ways, the concept of conjoint sovereignty is a novel reformulation, which is neither impossible nor unattainable, contrary to Chief Justice Brennan's fears. In *Wik*, Chief Justice Brennan notes that it is "too late now to develop a new theory of land law that would throw the whole structure of land title based on Crown Grants into confusion."²⁸⁹ This would, *prima facie*, suggest that the concept of conjoint sovereignty would not withstand judicial scrutiny. On the other hand, the concept of conjoint land authority is nothing new. Just as alluvial titles could easily "stand outside the feudal system,"²⁹⁰ coexisting as a matter of right with freehold titles, Native Titles would be based only on conjoint land-based sovereignty, suggesting that the "sovereignty" being addressed is limited to some extents (and "outside" the general system).²⁹¹ This could arguably (and ideally) expand over time as Australia comes closer to achieving true reconciliation. The following paragraphs serve to elucidate how this is possible by debunking key challenges, addressing key prerequisites, defining new approaches, outlining operational issues, and highlighting the key benefits of using conjoint sovereignty to build a new Native Title system.

a. Debunking Challenges

While these observations address Chief Justice Brennan's doubts about reformulating sovereignty, they fail to address some larger

285. *Mabo v. Queensland [No 2]* (1992) 175 CLR 1, ¶ 50.

286. Cassidy, *supra* note 50, at 50 (quoting *Amodu Tijani v. Secretary of Southern Nigeria*, 2 A.C. 399, (1921)).

287. *See Mabo*, 175 CLR 1.

288. *See id.* ¶¶ 81, 89.

289. *Wik v. Queensland* (1996) 134 ALR 637.

290. Cassidy, *supra* note 50, at 47.

291. *See* Brian Slattery, *Understanding Aboriginal Rights*, 66 CAN. B. REV. 727, 759-60 (1987), *construed in* Cassidy, *supra* note 50, at 47 n.56.

challenges, three of which must be discussed and rebuffed. First, sovereignty has traditionally been seen as the embodiment of state power, otherwise termed the "act of state" doctrine.²⁹² This doctrine holds that only nation-states can have legal "rights and duties" to their "Peoples."²⁹³ Second, sovereignty has traditionally required "organization," such that a group of disorganized individuals (often termed "primitive" in historical parlance) cannot exercise it.²⁹⁴ Third, consistent with the traditional English view espoused by William Blackstone, sovereignty is by its very nature derived "of necessity" from "one supreme, irresistible, absolute, uncontrolled authority"²⁹⁵ such that if an entity was not alone or subjected to any controls whatsoever, then it would no longer be "sovereign."

Each of these can be readily rebuffed. First, if nation states are the locus of the legal rights and responsibilities to their Peoples, it stands to reason they can also choose to share these rights and responsibilities with other Peoples, such that their sovereignty is jointly shared by more than one People. Second, it is well understood that anthropologists have debunked the naive notion that Australian Native Peoples are (and were) disorganized: rather, they are "organized" differently from non-Native Peoples through patrilineal descent groups and Songline management authorities.²⁹⁶ Lastly, if an authority is truly "supreme" and "absolute," then it should stand to reason that the authority could choose to share its supremacy. Thus, the "supremacy" remains intact, albeit shared conjointly between two sovereigns. The fact that only conjoint sovereignty over the land is being exercised in the new scheme gives those rejecting a conjoint formulation the chance to envision it as a means of a sovereign's sharing power with a group²⁹⁷ under the sovereign's aegis. This, however, can be rebuffed based on the simple historical reality that one cannot say that Britain ever truly exercised sovereignty over Australia's massive geographic expanse.²⁹⁸ More aptly, Britain

292. Henry Reynolds, *Sovereignty*, in CITIZENSHIP AND INDIGENOUS AUSTRALIANS: CHANGING CONCEPTIONS AND POSSIBILITIES 208, 209 (1998) [hereinafter CHANGING CONCEPTIONS].

293. Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARV. HUM. RTS. J. 57, 98 (1999).

294. CHANGING CONCEPTIONS, *supra* note 292.

295. *Id.*

296. See discussion *supra* Part IV.A. (discussing Native People's understandings of the land).

297. See Wiessner, *supra* note 293, at 122.

298. See Australia Surveying, *supra* note 16.

exercised sovereignty over small populated areas and only had a "sphere of influence" in the outlying areas.²⁹⁹ The concept of conjoint sovereignty can therefore overcome any need, real or imagined, to require "assimilation" of a People.³⁰⁰

In summary, redefining sovereignty as a conjoint relation enables one to overcome the traditionally entrenched doctrines of international and, by extension, English law. "Largely discredited" due to the extent to which they were used to "entrench the dominance of colonial interests" and led to the "subordination of Indigenous rights,"³⁰¹ it is time these laws are undone. Recognizing conjoint sovereignty over land is a start.³⁰²

b. Addressing prerequisites

The problems with conjoint sovereignty discussed above stem largely from three key prerequisites" of sovereignty that were traditionally assumed. However, these three "prerequisites" are neither necessary nor important. In essence, these three prerequisites, as reiterated by Justice Burton in *R. v. Murrell*,³⁰³ required that a group of individuals attain a "point of numbers and civilization, and to such a form of Government of laws, as to be entitled to be recognized"³⁰⁴ as a sovereign state.

The first criterion, numbers, was rejected by jurists and theorists as early as 1873 because they found that Australian Native Peoples were quite sufficient in numbers to manage their affairs.³⁰⁵ Modern governments have found that often there need not be vast numbers of

299. CHANGING CONCEPTIONS, *supra* note 292, at 211.

300. Tim Rowse, *Indigenous Citizenship and Self-determination: The Problem of Shared Responsibilities*, in CHANGING CONCEPTIONS, *supra* note 292, 81-84.

301. HEATHER MCRAE ET AL., *INDIGENOUS LEGAL ISSUES* 139 (1997).

302. It is important to distinguish between this idea and the Aboriginal reserves, which had been set-aside on pastoral reserves in the 1850s as a form of "joint" ownership. First, these lands were often simply "set asides" which involved little, if any, say from the Native Peoples regarding where they were or how they were managed. Second, there was the fact that Native Peoples were not used to staying in one place. As hunters and gatherers, and particularly in light of the demand for their labor, they left. The concept of conjoint sovereignty transcends this concept on far more fundamental and significant levels. See HEATHER GOODALL, *INVASION TO EMBASSY: LAND IN ABORIGINAL POLITICS IN NEW SOUTH WALES, 1770-1972* 53 (1996) (discussing the pastoral reserve experiments with Native Peoples in the 1850s).

303. *Murrell*, (1836) 1 Legge 72.

304. *Id.*, construed in *THREE NATIONS*, *supra* note 4, 40 (emphasis added).

305. See JOHN AUSTIN, *LECTURES OF JURISPRUDENCE* (4th ed. 1873); see also CHRISTIAN WOLFF, *THE LAW OF NATIONS* (Clarendon Press ed., 1934).

individuals to justify granting them control, as Canada's decision to set aside over 1,900,000 km² of land for 20,490 Inuit illustrates.³⁰⁶

The second criterion, civilization, had been largely supported by *modi operandi* dating back to Cicero. However, a Grand Jury in South Australia in 1847 held that "all the Native Tribes [in Australia] . . . [are] in a situation to make laws and to adopt usages for their own protection and Government."³⁰⁷ This suggested that even the Australian public found the Native Peoples were not "uncivilized." Modern anthropologists would support this conclusion as well.

Finally, the third criterion, independence,³⁰⁸ could be simply met by Australian Native Peoples by virtue of their obvious independence before Britain's arrival in 1788, something Burton readily admitted himself. At issue in Burton's calculus was the fact that Britain did not see the Native Peoples as independent. Instead, Britain applied the *terra nullius* doctrine. If, however, this doctrine has been discarded by Australia's own High Court in *Mabo*, then Australia's Native Peoples were not only independent when Britain arrived, but still arguably have vestiges of independence to the degree in which they see themselves as independent today. Recognizing conjoint sovereignty vis-à-vis land would then recognize this very fact.

c. Defining Approaches

If conjoint sovereignty passes the requisite tests and debunks key challenges to its legitimacy, the next key step is determining how it should be approached (i.e., whether it could or should be embraced by the Courts, the legislature, or referenda) and in what order. Consideration of these routes suggests there probably needs to be a combination of approaches, with the legislature first approving conjoint sovereignty over land via regulations, the People of Australia then confirming their approval in a referendum (with an appropriate constitutional amendment), and the courts lastly clarifying the meaning and import of conjoint sovereignty as it is incorporated into the common law. While the first two efforts would undoubtedly

306. See Nunavut, available at <http://www.canadainfolink.ca/nunavut.htm> (last visited Nov. 29, 2003) (containing maps and information about Nunavut).

307. THREE NATIONS, *supra* note 4, at 40-41.

308. See HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW (1936). "Independence" has been largely used to depict Burton's third criterion requiring individuals to be able to "form a Government of laws," which came to be a dominant test used by foreign powers to see if they could exert their sovereignty.

require significant effort and public relations expertise, they could succeed if well managed.

The order of these stages noted above makes sense given that the initiative of conjoint sovereignty is so new. Australian Courts have essentially determined the matter of Native Sovereignty is not only closed, but is "beyond inquiry" because "[e]xtensions of sovereignty, . . . are matters of international, not domestic law,"³⁰⁹ and "acquisition of territory is a prerogative of the Crown which cannot be questioned by the courts."³¹⁰ Because conjoint sovereignty at its core requires the sharing of power, the polity itself must approve that power. The Courts, by following the directive that they are prevented from adopting "rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency"³¹¹ would thus see the public as the locus of control. There is also the simple fact that since Native sovereignty would not be unbridled, (i.e., it would exist only in relation to land), the legislature would also need to clearly iterate these constraints. This would apply to the need for the legislature to elucidate additional guidelines vis-à-vis Native Title, such as those in *Delgamuukw* requiring that First Nation Peoples have a "continuous connection" with their land.³¹² It would also allow the needed debate for clarifying how to manage Native People's claims, requiring more than simply recognizing Native Title of all Australia in a quasi-Nunavut formulation.³¹³

309. *THREE NATIONS*, *supra* note 4, at xvi. Reynolds also quotes Patrick Macklem as saying that "a relationship between sovereigns was a relation of equality in which each views itself and the other as independent and distinct." *Id.* at 178. He also references H. Hannum as noting that "political loyalty to an existing state does not necessarily imply national or cultural disloyalty," appearing to divorce the issue of culture from state management. H. HANNUM, *AUTONOMY, SOVEREIGNTY AND SELF-DETERMINATION* 454 (1990), *construed in* *THREE NATIONS*, *supra* note 4, at 179.

310. *THREE NATIONS*, *supra* note 4, at xvi (explaining partly why judges always have dodged some of the most important legal—not to mention moral and political—issues confronting Australia).

311. *Mabo v. Queensland [No 2]* (1992) 175 CLR 29, *construed in* *Legg*, *supra* note 49, at 402 n.79.

312. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010.

313. The Nunavut formulation would not work for many reasons, not the least which include the facts that (a) the Inuit see themselves as a unified "people" while Australian Native Peoples comprise an array of groups, (b) the Inuit were more focused on a "way of life" and fewer links to the land, per se, (c) the Nunavut's economics of fishing are disparate from Australia's focus on minerals and ore in predominantly Native areas, and (d) Canadians attitudes towards Inuit and other

One legislative process recognizing conjoint sovereignty could involve a treaty, either between the Commonwealth or individual STGs. Such a treaty could be wrought with each of the individual Aboriginal Districts integrally involved in voting and selecting representatives to ATSIC.³¹⁴ Power would therefore not be monolithically concentrated, reflecting the plurality of Native Peoples; it would stem from a political division that, while imperfect, has some history. If Native Peoples, State legislatures, and the Commonwealth perceived a new approach was needed (e.g., full-scale referenda among Native Peoples), then this could be readily pursued.

d. Outlining Operations: What, How, and Where

Once such a new Native Title system was approved by the polity and introduced based on the principles of conjoint sovereignty with mandatory easements, three key questions need to be answered. First, what processes would be used to determine the nature of Native Title Holders' needs subjected to ADR? Second, how would these processes be implemented, especially in terms of ensuring sensitivity among the implementers? Lastly, where would jurisdictions exist for the processes to take place? Preliminary answers to each question follow, providing a framework for one possible regime.

One of the key challenges in defining the processes determining Native Title holders' needs is ensuring their sensitivity to Native Peoples' cultural practices and what processes should be used to ensure this sensitivity. The Court in *Delgamuukw* found that oral evidence was central to determining Native People's claims. In Australia, however, while it is true that most evidence would be transmitted orally, it is also true that doing so could be tantamount to blasphemy.³¹⁵ There is also the concern that the Dreaming and

Eskimos are largely positive, while Australia's relationship with its Native Peoples has been marked by significant social and political tension. Maureen Tehan, *Customary Title, Heritage Protection, and Property Rights in Australia: Emerging Patterns of Land Use in the Post-Mabo Era*, 7 PAC. RIM L. & POL'Y J. 765 (1998) (noting there were over 500 language groups in Australia at the time of colonialization and Indigenous Australians saw land as a source of laws, customs, and identity, representing a "complex of meaning which [will] explain the universe."). *Id.* at 771-72; see also Matthew C. Miller, *An Australian Nunavut? A Comparison of Inuit and Aboriginal Rights Movements in Canada and Australia*, 12 EMORY INT'L L. REV. 1175 (1988); see also Nunavut, *supra* note 306.

314. See AUSTRALIAN BUREAU OF STATISTICS, *supra* note 200, at 14 (illustrating the locations and names of the 36 Aboriginal Districts which currently comprise ATSIC).

315. See THE SONGLINES, *supra* note 159; see also John Basten, *Recent Developments in Native Title Law and Practice: Issues for the High Court*, in 2 LAND, RIGHTS, LAWS:

Songline information being "handed over" is intellectual property,³¹⁶ which would require effective protections.³¹⁷ These concerns underscore the need for confidentiality, the involvement of individuals who are aware of and can communicate key concerns without breaching confidentiality, and defining processes that ensure the sanctity of any negotiations and discussions that transpire.

In addition to determining what processes should be used, the next question is how they should be introduced. A patent disconnect seems to exist between recognizing Native Peoples' spiritual "connection" to the land while framing it as a legal "right" under the rubric of "Native Title." One solution to this quandary is ensuring that ADR processes are carried out under the aegis of an "Indigenous order,"³¹⁸ reflecting the degree to which the processes are those created by Native Peoples themselves. In other words, the processes, while involving Native and non-Native Peoples alike, would be co-managed and co-overseen by Native Peoples. This theoretically should not pose a problem to non-Native peoples to the extent in which the decision-making authority (inasmuch as it exists via ADR methods) is neither controlled nor centralized in any Native or non-

ISSUES OF NATIVE TITLE 1 (2002), available at <http://www.aiatsis.gov.au/rsrch/ntru/ntpapers/ipv2n13.pdf> (last visited Oct. 29, 2003) (writing that "revelation of the knowledge in a manner that is unlawful according to traditional law would destroy the significance and character of sites and . . . damage . . . the land."). But see Nathan Hancock, *Is This the Spanish Inquisition?: Legal Procedure, Traditional Secrets, and the Public Interest*, in HERITAGE AND NATIVE TITLE: ANTHROPOLOGICAL AND LEGAL PERSPECTIVES 91 (1996).

316. Srividha Ragavan, *Protection of Traditional Knowledge*, 2 MINN. INTELL. PROP. REV. 1 (2001) (discussing what can constitute intellectual property).

317. See Kristin Ann Matisse, *Recognition of Indigenous Heritage in the Modern World: U.S. Legal Protection in Light of International Custom*, 27 BROOK. J. INT'L L. 1105 (2002) (detailing how the United States has pursued the goal of protecting Indigenous heritage in Native American Graves Protection and Repatriation Act (NAGPRA) in light of international standards in the (a) Hague Convention, (b) 1970 United Nations Economic and Social Council (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property, (c) 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, (d) International Institute for the Unification of Private Law (UNIDROIT) Convention on Stolen or Illegally Exported Cultural Objects, (e) International Labor Organization (ILO) Convention no. 169, and (f) the Draft United Nations Declaration on the Rights of Indigenous Peoples).

318. See WILLIAM SANDERS, *TOWARDS AN INDIGENOUS ORDER OF AUSTRALIAN GOVERNMENT: RETHINKING SELF-DETERMINATION AS INDIGENOUS AFFAIRS POLICY* 3-16 (2002), available at http://eprints.anu.edu.au/archive/00001111/00/2002_DP230.pdf (last visited Oct. 29, 2003).

Native "authority" per se. Instead, Native Peoples could manage facilitating bodies, much as executive appointees manage different administrative agencies. Such attempts have been made in Canada,³¹⁹ as well as in Australia with ATSIC, a Commonwealth Government Body.³²⁰ This may require Australia to embrace a philosophy of "Self-Governance" towards Native Peoples, which transcends the concepts of "Self-Determination," "Self-Management," and "Self-Empowerment" previously attempted.³²¹

The third and final question addresses the issue of where jurisdictions would exist for the processes in place, forcing one to ask if the current ATSIC model fits Native Peoples' needs.³²² For these purposes, probably the best system would be that which confirms the acceptance of Native Peoples' conjoint sovereignty in the first place. Indeed, whatever jurisdictional model is used to formalize the conjoint sovereignty of the Crown and Native Peoples is essentially the form that should be employed in redressing past injuries, affirming and protecting key rights, and starting down the road to self-determination and self-government.³²³

e. Highlighting Key Benefits

The benefits of a new system to Native Title based on conjoint sovereignty are potentially immense. First and foremost, the new system would enable Native and non-Native peoples to avoid litigation³²⁴ and employ more robust, non-adversarial systems, taking to heart the fundamental question from *Delgamuukw*: "[I]f everyone agrees the issues should be negotiated, why are they still going to

319. *Id.* While Courts have still facilitated many claims, administrative departments have been established, such as in British Columbia, to oversee efforts to clarify Native Title over many Native Lands. *Id.* at 9.

320. *Id.* at 7.

321. See Exhibit 3, *supra* note 90.

322. See AUSTRALIAN BUREAU OF STATISTICS, *supra* note 200, at 14.

323. See G. Clark, *A New Relationship with the Federation*, in ATSIC NEWS, Feb. 2001; see also Ravi de Costa, *Treaty Now? First, A Closer Look at the British Columbia Treaty Process*, 5 INSTITUTE FOR SOCIAL RESEARCH (ISR) WORKING PAPERS SERIES 1 (2002) (highlighting key observations and take-a-ways from British Columbia's attempts to forge a treaty with its First Nation Peoples).

324. See Geoffrey R. Schiveley, *Negotiation and Native Title: Why Common Law Courts are not Proper Fora for Determining Native Land Title Issues*, 33 VAND. J. TRANSNAT'L L. 427 (2000) (arguing that the common law courts are inappropriate fora to determine Native Title claims due to their creating "inherent constraints on their [own] ability to deal with the problems raised by issues of native rights.").

court?"³²⁵ To date, Courts have been the only places where Native Peoples have been able to turn because of Native Peoples' inability to exercise sovereignty over their land or have their sovereignty recognized. Transcending the Courts would enable Native and non-Native People to discard flawed processes which require trying to convince judges the merits of different "sides"³²⁶ when the judges have little or no connection to the given cases, halt the current erosion of Native Title by implicitly reinvigorating the RDA, and establish a more consistent approach³²⁷ which results in saner, more just outcomes.³²⁸ There is, finally, the ultimate benefit of invalidating extinguishment as an option, notwithstanding constitutional arguments to its use.³²⁹

4. Area 3: Problem/Conflict Management

As noted above and in Exhibit 11, the area of conflict management is a locus of significant change and improvement over the current system, though this does not suggest it will be easy. While the RTN was largely eschewed by the NTAA due to its demands on peoples' time and resources, one cannot expect the new

325. *Id.* at 467.

326. Meyers & Raine, *supra* note 44, at 110.

327. Particularly in contrast to the Native Title Act (i.e., post-Native Title Amendment Act) with rights to notice, comment, and negotiation interspersed inconsistently throughout.

328. See Heidi Kai Guth, *Dividing the Catch: Natural Resource Reparations to Indigenous Peoples—Examining the Maori Fisheries Settlement*, 24 U. HAW. L. REV. 179, 180 (2001). While not writing about land claim settlements, per se, Heidi Kai Guth notes how the Maori people benefited from a close relationship with the New Zealand government in facing the challenge of assigning values to resources, which often "cannot just be assigned a present monetary or quantitative value." Ultimately, they were able to jointly "define [the resources] in a manner that both examine[d] how [the Maori] lived at the time of cultural impact and incorporate[d] contemporary realities and desires." *Id.*

329. The main constitutional argument against extinguishment is based on *Australian Constitution* s 116, which bars the government from preventing one from exercising one's religion and, unlike in the United States, has never been tested. See Helen Grutzner, *Invalidating Provisions of the Native Title Act of 1993 on Religious Grounds: Section 116 of the Constitution and the Freedom to Exercise Indigenous Spiritual Beliefs*, in JUSTICE FOR ALL? NATIVE TITLE IN THE AUSTRALIAN LEGAL SYSTEM 85 (2001). In the United States, Indians have failed in their attempts to stop the government from taking religiously obtrusive action. See *Lyng v. N.W. Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988).

approach to result in decreasing the time spent negotiating claims.³³⁰ One of the main problems with the RTN was the fact that it was not focused over how land could best be shared, but instead over who got the land and subsequently won. This led individuals to enter negotiations strongly pitted against one another, as opposed to attempting to work with one another. Under the new system, the issues on the table will be far less onerous and far more amenable to agreement. By ensuring,³³¹ as was highlighted in *Delgamuukw* and noted *supra*, that Native Peoples' oral evidence is accorded weight, it is inevitable that negotiators, mediators, and arbitrators will be better aware of the challenges they face.³³² Evidence of the limited success of Indigenous Land Use Agreements (ILUAs), as opposed to Native Title Claims, suggests the value of working towards joint agreements if the parties are willing and able to do so.³³³ The fact that supplemental mediation will be needed between Native Peoples themselves,³³⁴ each having conflicting needs depending on the Songlines and Dreamings which pass through certain lands,³³⁵ will furthermore serve to build (or rebuild) bridges between Native Peoples' communities which would otherwise be strained. Ultimately, the main goal is building processes which, by virtue of the fact they are jointly used by Native and non-Native peoples and are not

330. Therefore, fast tracking negotiations, even though there may be only "limited effects," is thus not an option; though the fact that it is no longer a zero-sum game reduces its need. See *Native Title Summary*, *supra* note 38.

331. See Richard Bradshaw, *Negotiating Exploration and Mining Agreements Under the Native Title Act*, in *THE SKILLS OF NATIVE TITLE PRACTICE* 114, 116-123 (1995) (noting the need for rules and guidelines in any arbitration or mediation proceedings, though these rules should be unduly burdensome and excessive).

332. See Peter Sutton, *The Relative Strengths of Oral and Written Evidence*, in *PROOF AND MANAGEMENT OF NATIVE TITLE* 20, 21 (1994); see also Nonie Sharp, *NO ORDINARY JUDGMENT: MABO, THE MURRAY ISLANDERS' LAND CASE* 103-114 (1996) (discussing the challenges of admitting hearsay in *Mabo*).

333. See National Native, *supra* note 66 (containing a map detailing IULUAs across Australia); but see *id.* (Geographic Extent of Claimant Applications as per Register of Native Title Claims map detailing the comparative *failure* of the Native Title system); see also *id.* (Determinations of Native Title map).

334. The "beneficial incidents" of Native Title for different Native Peoples will differ from group to group. Thus, the groups must sit down together and, with arbitrators, mediators, & negotiators, confirm what things should "count" and "matter" (e.g., as is often done between groups comprising large labor unions).

335. See Fred Chaney, *Mediation Between Different Indigenous Groups As Part of the Broader Mediation Process*, in *WORKING WITH THE NATIVE TITLE ACT: ALTERNATIVES TO THE ADVERSARIAL METHOD* 93 (1997).

governed by a zero-sum game, develop the spirit which moves the parties closer to reconciliation.

5. Areas 4 & 5: Pastoral Lease & Easement Security

In summary, the fact that the new approach mandates easements on given lands helps ensure that non-Native Peoples' fears are laid to rest. At its core, the new approach is based on a fundamental tenet that collective and individual rights of Native and non-Native Peoples can coexist and both receive the security they demand and deserve.³³⁶ Mandated easements, in particular, address the needs of miners who have often felt "ignored" in what they considered the "excessive size of land grants" to Native Peoples.³³⁷ So, too, would mandated easements address the needs of Pastoralists, concerned that the tracts on which they have built their livelihoods will continue to be able to serve their herding needs for future generations. The current system, which presents the stark choice of either giving the Native People sole access to the lands (barring the pastoralists) or honoring the pastoralists' leases (ignoring the Native People's needs), is no choice at all. Making a multiple-choice question of "Aboriginal land rights," which Henry Reynolds describes as the "oldest question in Australian politics,"³³⁸ undeniably fails to accord the question its due.

V. CONCLUSION

Australia's inability to realize the import of Native Title and *Mabo's* vision has been ascribed in the preceding pages to a failure of the High Court to clearly define what Native Title means. In all fairness, however, it also stems from Australia's inability to define itself. One can argue persuasively that in its very short history as a Nation, celebrating its Centenary in 2001, Australia has been forced to grow up quickly. Now a vibrant, multicultural democracy, it has been forced onto the world stage still not sure of its identity. Surely, its British heritage has served it well, though not in a current world

336. See Leighton McDonald, *Can Collective and Individual Rights Coexist?*, 22 MELB. U. L. REV. 310, 329-30 (1998) (detailing how Kymlicka's theory of minority rights requires secure and meaningful cultural contexts so individuals "can adequately determine how to live their lives.") *Id.* The same can hold true for the majority, as well.

337. J. P. NIEUWENHUYSEN, ABORIGINAL LAND RIGHTS AND INDUSTRY / INFORMATION PAPER NO. 4, 18 (1980).

338. Henry Reynolds, Address at the National Library of Australia (Oct. 21, 1986).

in which twenty-five percent of its population was born abroad,³³⁹ a percentage likely only to increase at current immigration levels. Furthermore, its relationship to its Native Peoples remains amorphous: on the one hand, it seems to want to embrace the scars of its past; on the other hand, it wants to run away.

The recent Howard government has notably refused to apologize to Native Peoples on behalf of Australia for what occurred,³⁴⁰ and arguably continues to occur, on the basis that the current government is not responsible for the past. Historian Keith Windschuttle argues that "Australia's historical establishment . . . has largely fabricated and mythologized the notion that British settlement of Australia from the late 18th century was a story of genocide of its indigenous people"³⁴¹ often "inventing large scale killings of Aborigines that never occurred."³⁴² Now that it appears Australians are not even sure about the past, or possibly want to run away from the past, at the very least one wonders if Australia can simply focus instead on the realities of the present: addressing the fact that Native Peoples are increasingly being denied access to lands they held before any European settlers arrived. These facts are not in dispute.

It is ultimately hoped that the ideas in this paper, in particular the new approach toward Native Title claims employing conjoint sovereignty and mandated easements, will be viewed as "thought-starters" for future consideration, debate, and discussion. Surely, there will be no easy answers; but one thing is certain: either a solution will be found, or Native Peoples will cease to be. In these

339. See Exhibit 14, *supra* note 248.

340. See *Australia's Aborigines: A Dispute over Mistake Creek*, THE ECONOMIST, Dec. 14, 2002, at 37.

341. *Id.* See KEITH WINDSCHUTTLE, THE FABRICATION OF ABORIGINAL HISTORY: VOLUME I—VAN DIEMAN'S LAND 1803-1847 (2002). But see Editorial, *The Other Australia*, THE NEW YORK TIMES, Sept. 17, 2000, at 18 (admonishing Australia for its treatment of Native Peoples and recounting horrors in its history); see also Ben Kiernan, *Australia's Aboriginal Genocides*, THE BANGKOK POST, Sept. 10, 2000 (referencing "ethnic cleansing" and "transit camps" which the government set up in its quest to better manage Australia's Native Peoples); see also PHILLIP KNIGHTLEY, AUSTRALIA: BIOGRAPHY OF A NATION (2000) (containing a chapter entitled "Black Australia" drawing parallels between the Holocaust and what occurred to Australia's Native Peoples); see also HENRY REYNOLDS, THE OTHER SIDE OF THE FRONTIER (1981) (detailing Aboriginal injustices for the first time in significant detail).

342. Gleebooks, Inc., Book Review (reviewing KEITH WINDSCHUTTLE, THE FABRICATION OF ABORIGINAL HISTORY: VOLUME I—VAN DIEMAN'S LAND 1803-1847 (2002)), available at <http://www.leebooks.com> (last visited Oct. 30, 2003).

regards, High Court Justice Michael Kirby's³⁴³ reflections on equal rights and Australia's Native Peoples at the Opening Ceremonies of Gay Games VI on November 5, 2002, carry significant resilience:

We began our modern history by denying the existence of our indigenous peoples and their rights We have not corrected all these wrongs. But we are surely on the road to enlightenment. There will be no U-turns [T]he movement for equality is unstoppable . . . in the end, inclusion will replace exclusion For the sake of the planet and of humanity it must be so."³⁴⁴

343. Justice Michael Kirby is the only openly gay justice on the High Court of Australia—the only country in the world with an openly gay Justice on its highest court. Notably, Justice Kirby was not open about his sexual orientation when he was appointed to the High Court after serving as the UN Special Representative for Human Rights in Cambodia, though he “came out” soon thereafter. See Michael Kirby, *Same Sex Relationships: Some Australian Legal Developments*, 19 AUSTL. BAR R. 1, 28 (1999).

344. Michael Kirby, *Courage*, Address at the Opening Ceremonies of Gay Games VI (Nov. 5, 2002), available at <http://www.us.altnews.com.au/print.php?sid=3728> (last visited Oct. 30, 2003).

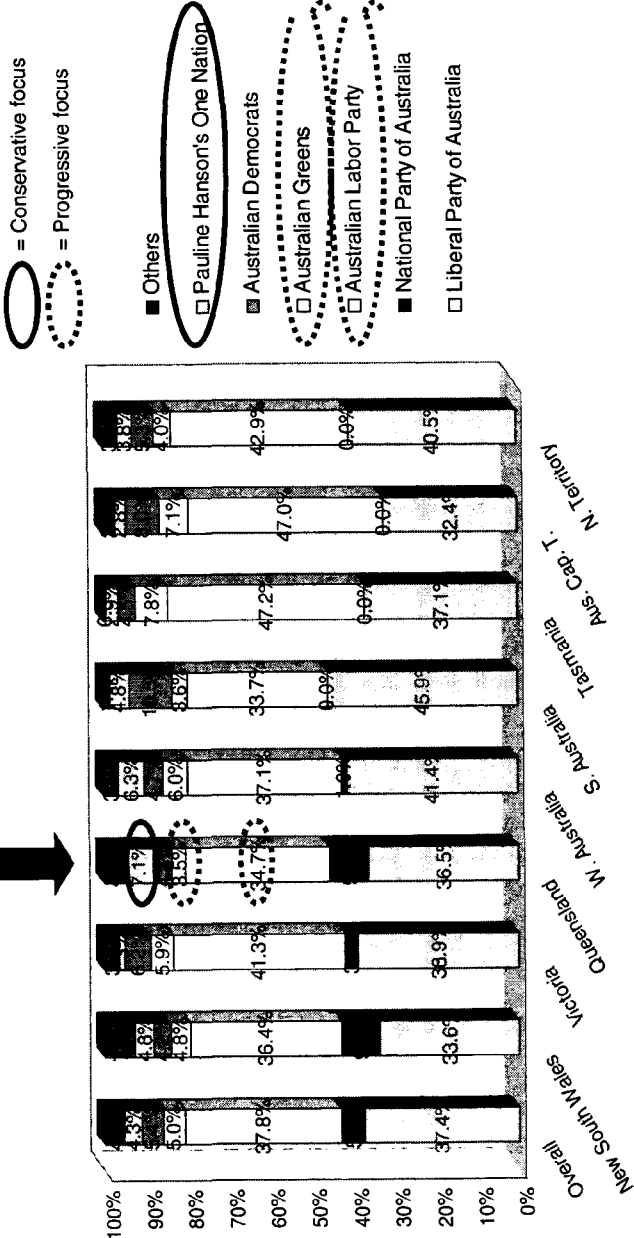
APPENDIX

- Exhibit 1.** Chart: Percent of votes cast in most recent Australian Federal Election, grouped by states and parties (2001).
- Exhibit 2.** List and summary of key events leading up to the High Court's recent *Ward* and *Wilson* decisions.
- Exhibit 3.** Summary of the Australian government's views towards Aboriginals since 1972.
- Exhibit 4.** Summary of the effect of the Native Title Amendment Act (NTAA) on Key Constituencies.
- Exhibit 5.** Areas affected by the NTAA (1 of 6).
- Exhibit 6.** Areas affected by the NTAA (2 of 6).
- Exhibit 7.** Areas affected by the NTAA (3 of 6).
- Exhibit 8.** Areas affected by the NTAA (4 of 6).
- Exhibit 9.** Areas affected by the NTAA (5 of 6).
- Exhibit 10.** Areas affected by the NTAA (6 of 6).
- Exhibit 11.** Summary of key areas addressed by a new approach integrating Conjoint Sovereignty and Mandated Easements to better meet Native People's interests.
- Exhibit 12.** Map of Dreamings and Songlines inside Agharringa Country in Central Australia.
- Exhibit 13.** Political cartoons by Simon Kneebone, C. Pryor, and A. Moir expressing cynicism after *Mabo*.
- Exhibit 14.** Chart: Origins of individuals in Australia, 1945 and 1996.
- Exhibit 15.** Native Title Quotes.

EXHIBIT 1

QUEENSLAND WAS THE BASE OF SUPPORT OF THE EXPLICITLY XENOPHOBIC ONE-NATION PARTY,, AND MOST OPPOSED TO THE PROGRESSIVE GREENS AND LABOUR PARTY,, IN THE MOST RECENT FEDERAL ELECTION

Percent of total votes cast* in Australian Federal Election, 10 November 2001



* National Party was not on the ballot in South Australia, Tasmania, ACT, or the Northern Territory; individuals could instead vote for the Liberal Party (previously in coalition with the National Party) to express their support for the National Party.
Source: Australian Election Commission; analysis by C. Scott López.

EXHIBIT 2

MANY EVENTS LED UP TO THE HIGH COURT'S RECENT DECISIONS IN *WARD & WILSON*

Dates

Key events

20 May 1982	Eddie Mabo, Dave Passi, and James Rice file suit v. the State of Queensland and the Commonwealth claiming "Native Title" to the Murray Islands.
1985	In attempting to nullify the case, the Queensland (Qld) Parliament passes the <i>Queensland Coast Islands Declaratory Act (QIDA)</i> retrospectively extinguishing the Islanders' claimed "Native Title" rights to the Murray Islands
Dec., 1998	The High Court, in <i>Mabo v. Queensland (No. 1)</i> (1998) 166 CLR 186 finds the QIDA <i>invalid</i> because of its inconsistency with the <i>Racial Discrimination Act 1975 (Cth)</i> . The original <i>Mabo</i> proceedings continue.
3 Jun. 1992	The High Court, in <i>Mabo and Others v. Queensland (No. 2)</i> (1992) 175 CLR 1 recognizes Native Title in Australian law and holds that acts of the Crown did not extinguish rights among Native Peoples who have on-going connections with their traditional lands.
19 Dec. 1993	Parliament enacts the <i>Native Title Act 1993 (NTA)</i> , addressing the consequences of recognizing Native Title and setting up rules for dealings in native title land and waters. Legislation follows lengthy negotiations among Native stakeholders, gov't. representatives, pastoralists, & the mining industry.
Jan. 1994	National Native Title Tribunal (NNTT) established and Native Title Representative Bodies (NTRBs) recognized in law.
Mar. 1995	The High Court, in <i>Western Australia v. Commonwealth</i> , rejects Western Australia's constitutional challenge to the <i>NTA</i> and invalidates Western Australia's attempt to enact legislation that offered less protection of Native Peoples' rights.
Dec. 1996	The High Court, in <i>Wik Peoples v. Queensland</i> , finds that Native Title is not necessarily extinguished by the grant of a pastoral lease and that Native Title can coexist with other interests in land.
6-8 Jul. 1998	Native Title Amendment Act (NTAA) is passed with 298 amendments; the Act makes substantial changes to the future act regime, registration test, validation provisions, relative roles of the Federal Court and NNTT, statutory regulation of NTRBs, and Indigenous Land Use Agreements (ILUAs).
6 Jul. 1998	The Federal Court, in <i>Yamirr v. Northern Territory</i> [1998] 771 FCA finds that Native Title exists over the entire area of sea & seabed in the Croker Isles ; the rights, however, were 'non-exclusive' & 'non-commercial' & the decision is appealed; the High Court <i>upholds</i> the decision in <i>Cth v. Yamirr</i> [2001]
10 Sept. 1998	The High Court, in <i>Fejo v. Northern Territory</i> , confirms that the grant of freehold extinguishes Native Title .
18 Dec. 1998	The Federal Court, in <i>Yorta Yorta v. Victoria</i> [1998], finds that Native Title never existed over Crown land and water along the Murray River in a populated area in New South Wales; Olney J, for the Court, said that the 'tide of history' had washed away the Yorta Yorta's traditional laws and customs.
18 Mar. 1999	UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) expresses concern about several NTAA amendments ; the Human Rights Committee (HRC) echoes this concern with regards to the provisions being contrary to the Int'l Convention on Civil & Political Rights (CPR).
7 Oct. 1999	The High Court, in <i>Yanner v. Eaton</i> , finds that statutory vesting in Qld of property in fauna did not extinguish Native Title rights to take crocodiles.
11 Apr. 2001	Full Federal Court, in <i>Lardil v. Queensland</i> , confirms serious flaws in the protection offered by the future act regime to registered title claimants.
8 Feb. 2002	The Federal Court, in <i>Central Qld. Land Council Aboriginal Corp. v. Atty. Genl (Cth) and Qld</i> , Invalidates Cth approval of Qld alternative procedures under Sec. 43 of the NTA; it also rejects challenges to alternative right to negotiate procedures approved under section 26A of the NTA.
8 Aug. 2002	The High Court, in <i>West Australia v. Ward and Wilson v. Anderson</i> , holds that pastoral and mining leases can extinguish Native Title access to land, no Native Title exists for economic-products (e.g., minerals or petroleum), and perpetual leases can extinguish Native Title altogether .

Source: Coral Dow, *Mabo: Ten Years On*, available at www.apb.gov.au/library/intguide/SP/mabo.htm; edited and supplemented by C. Scott López.

EXHIBIT 3

THE AUSTRALIAN GOVERNMENT’S VIEWS TOWARD ABORIGINALS HAS EVOLVED
SIGNIFICANTLY OVER THE LAST THREE DECADES AND THROUGH FIVE ADMINISTRATIONS

Government ¹	Years	Philosophy ²	Key initiatives addressing & involving Native Peoples
Gough Whitlam	1972-75	"Self-Determination"	<ul style="list-style-type: none">• Establishes Department of Aboriginal Affairs (DAA) [taking over discredited Aboriginal Welfare Authorities (AWAs) run by states and territories]• Encourages increased Community-based Indigenous Organizations• Creates Royal Commission to conduct inquiry into how aboriginal land rights can be best recognized throughout Australia• Inaugurates National Aboriginal Consultative Committee (NACC) of 41 elected Aboriginal representatives from across Australia to advise government on Indigenous Affairs
Malcolm Fraser	1975-83	"Self-Management"	<ul style="list-style-type: none">• Creates an Aboriginal Development Commission (ADC) from the DAA to focus exclusively on economic development among Native Peoples• Restructures NACC into National Aboriginal Conference (NAC)• Establishes Indigenous Councils to manage local Aboriginal affairs
Bob Hawke	1983-91	"Self-Determination" and "Self-Management"	<ul style="list-style-type: none">• Disbands NAC• Initiates the Aboriginal & Torres Strait Islander Commission (ATSIC) with elected representatives from 60 Aboriginal Councils & 20 appointments to a National Board of Commissioners (NBC)• Creates post of Aboriginal & Torres Strait Islander Social Justice Commissioner (ATSISJC) under the rubric of the Human Rights and Equal Opportunity Commission (HREOC)• Establishes National Council for Aboriginal Reconciliation (NCAR)• Restructures ATSIC into 36 (instead of 60) regional councils³
Paul Keating	1991-96		
John Howard	1996-Present	"Self-Empowerment"	<ul style="list-style-type: none">• Cuts ATSIC budget significantly• Leaves the ATSISJC position unfilled 1998-99• Centralizes budgetary controls of all Indigenous groups in Canberra, ATC

1 Denoted by Prime Minister
2 Espoused towards Australian Native Peoples as inferred by the current 36 regional councils
3 See Exhibit 6 for a map of the current 36 regional councils
Source: William Sanders, *Towards and Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy* (Centre for Aboriginal Economic Policy Research, Australian National University, 2002); analyzed and supplemented by C. Scott López.

EXHIBIT 4

THE NATIVE TITLE AMENDMENT ACT (NTAA) SIGNIFICANTLY SHIFTED POWER AWAY FROM NATIVE TITLE HOLDERS AND AUSTRALIAN NATIVE PEOPLES VIS-À-VIS NATIVE TITLE LANDS

Constituency	Effect on Power	Major effects of NTAA (see Exhibits 19-24, <i>infra</i>)
<div>Native Title holders and Native Peoples</div>	Significantly Reduced	<ul style="list-style-type: none">• Native Title holders have less ability to control exploration of their traditional lands, albeit slightly moderated by alternative consultative schemes.• Native Title holders have less ability to control Government activities on Native Title land, including the management of National Parks, Forest Reserves, Public Facilities, Water Resources, and Airspace use.• Only Native Peoples (a) who have been locked out of their traditional country or (b) did not have regular physical access when <i>Wik</i> was adjudicated have interim access rights to Pastoral Lease lands.• Native Title holders have less ability to contribute meaningfully to offshore fishing and mining activities impacting their Native Title rights.• Only Native Title Holders with explicit traditional connection and physical connection with the land have the Right to Negotiate* the terms of their Native Title, though exception is provided for "locked gates/stolen generation."• More complicated processes introduced at claims hearings, making it more difficult for Native Title holders to present their cases.• Native Title Holders' Right to Negotiate (RTN)* significantly affected:<ul style="list-style-type: none">- Reduced range of matters to which RTN applies;- State & Territory Governments (STGs) can replace RTN with alternative schemes (requiring Ministerial approval, though can include pastoral lease land in towns, cities, and over any designated large areas);- New Registration Test makes RTN significantly harder to access.
<div>State & Territorial Governments (STGs)</div>	Increased	<ul style="list-style-type: none">• STGs can replace RTN on Pastoral Lease lands with alternative schemes, as noted above.• STGs can pursue activities, noted <i>supra</i>, without needing to acknowledge RTN.• STGs can more easily extinguish Native Title on Pastoral Leases via (a) compulsorily acquiring co-existing Native Title rights and (b) upgrading leases to Freehold (thereby extinguishing all Native Title rights).
<div>Lease Holders</div>	Increased	<ul style="list-style-type: none">• Primary production activities allowed on Pastoral Lease land without needing to negotiate with Native Title holders with minimal, largely ineffective limits.
<div>Judiciary</div>	Reduced	<ul style="list-style-type: none">• Schedule details the types of leases which extinguish Native Title (instead of leaving it to court consideration).• Extinguishment of Native Title rights left to STGs to decide, as noted above; this capitalizes on the uncertainty of—and likelihood that—many Native Titles would have been protected at common law.

* The "Right to Negotiate" (RTN) gives Native Title Holders the authority to require individuals using Native Title land for designated purposes to negotiate with them regarding the specific terms of the use; see Exhibit 20 (item no. 13), detailing key changes to RTN in the NTAA

Source: Native Title Act 1993 (Cth); Native Title Amendment Act 1998 (Cth); see also Paul Burke *et al.* (for the Aboriginal & Torres Strait Islander Commission), *Detailed Analysis of the Native Title Amendment Act 1998*, Rev. ed., 1998, available at http://www.atcic.gov.au/issues/Land/Native_Title/detailed_analysis_of_the_native_.asp; summarized, edited, and supplemented by C. Scott López.

EXHIBIT 5





THE NATIVE TITLE AMENDMENT ACT 1998 (NTAA) UPDATED THE ORIGINAL NATIVE TITLE ACT 1993 (NTA) IN 21 KEY AREAS (1 of 6)			
Key area / Issue	Under NTA	NTAA amended approach	Affect on Native Peoples
1 Application of Racial Discrimination Act (RDA)	<ul style="list-style-type: none">Nothing in the NTA affects the independent operation of the RDA	<ul style="list-style-type: none">STGs[*] must administer Native Title systems in a "non-discriminatory" way (see s. 7)RDA must be used to interpret ambiguous terms in the NTA	<div>Legend: Positive ← ● → Negative No change ○</div> <ul style="list-style-type: none">Little scope left for explicitly challenging NTA provisions using the RDA—effectively overriding RDA protection
2 Activity validation procedures	<ul style="list-style-type: none">Clear system established for STGs granting exploration & mining leases on Native Title landUnclear if activities are possible on Pastoral Lease Lands	<ul style="list-style-type: none">STGs allowed to declare blanket approvals on exploration & mining activities— independent of Lease types—with no prior notice requirement for Native Title holders	<ul style="list-style-type: none">Rewards STGs (e.g., Queensland) who ignored previous NTA notice requirements and processes
3 Legislative extinguishment provisions	<ul style="list-style-type: none">Common law used to decide what extinguishes Native Title	<ul style="list-style-type: none">Lists grants which extinguish Native Title, including: all freehold grants, commercial leases, exclusive agricultural / pastoral leases, residential leases, and community purpose leases—<i>independent</i> of common lawSchedule of additional, special leases which grant "exclusive possession" and thus extinguish Native TitleDefines "extinguish" as "permanent extinguishment" (see s 237A)Provides for some exceptions, including: historic tenure 'ghost leases,' previously defined 'Aboriginal land,' 'national parks,' and 'lake freehold' Crown-to-Crown grants	<ul style="list-style-type: none">Native Title claims will be extinguished on huge land tracks before any court determines if the classes of extinguished land are correctly included in the NTAALegislation pre-empts the ability of common law to determine what lands can and should be able to be extinguished
4 Indigenous Land Use Agreements (ILUAs)	<ul style="list-style-type: none">ILUAs give Native Title to those who lodge requests, ignoring other Native Peoples who may lodge contradictory claims	<ul style="list-style-type: none">ILUAs are only legally binding after an open notification, objection, and registration process	<ul style="list-style-type: none">Significantly improves procedures for managing different groups of Native Title claimants fairly

^{*} State and Territory Governments
Source: Native Title Act 1993 (Cth); Native Title Amendment Act 1998 (Cth); see also Paul Burke *et al.* (for the Aboriginal & Torres Strait Islander Commission), *Detailed Analysis of the Native Title Amendment Act 1998*, rev. ed. 1998, available at http://www.atisc.gov.au/issues/Land/Native_Title/detailed_analysis_of_the_native_.asp (summarized, edited, and supplemented by C. Scott López).

EXHIBIT 6

THE NATIVE TITLE AMENDMENT ACT 1998 (NTAA)* UPDATED THE ORIGINAL NATIVE TITLE ACT 1993 (NTA) IN 21 KEY AREAS, CONTINUED (2 of 6)

Legend:  Positive  No change  Negative

Key area / Issue	Under NTA	NTAA amended approach	Affect on Native Peoples
Pastoral leases & use diversification 	<ul style="list-style-type: none"> Nothing noted about use diversification allowed on Pastoral Lease Lands Pastoral Leases can be renewed without needing to negotiate with Native Title holders if interests remain unchanged 	<ul style="list-style-type: none"> Use diversification allowed on <i>all</i> Pastoral Lease Lands less than 50 km² including agriculture, forestry, aquaculture, and farm-stay tourism STG Ministers can approve any activities on lands larger than 50 km² No need to negotiate with Native Title holders except for "off-farm" activities 	<ul style="list-style-type: none"> Primary production activities allowed on all Pastoral Lease lands less than 50 km² without any need to consult or negotiate with Native Title holders STG Ministers have rarely engaged Native Title holders in land use discussions for parcels larger than 50 km²
Water & airspace management 	<ul style="list-style-type: none"> Water management regimes require STG confirmation Hunting, fishing, gathering, and cultural activities in exercise of Native Title rights prevail over all NTG regulation if for personal, domestic, or non-commercial, communal needs 	<ul style="list-style-type: none"> Allows new STG legislation to govern the management of airspace and water resources 	<ul style="list-style-type: none"> No requirement for STGs to negotiate with Native Title holders regarding airspace and water resource management
Lease renewals & upgrades 	<ul style="list-style-type: none"> Limits permissible lease renewals to originally granted interests (i.e., no term improvements or extended tenures upon renewal unless coupled with RTN) 	<ul style="list-style-type: none"> Longer term and perpetual lease upgrades possible if certain procedural rights (albeit less extensive than RTN) are afforded Native Title holders 	<ul style="list-style-type: none"> Native Title holders denied of RTN <i>vis-à-vis</i> lease upgrades, though retain some minimal procedural guarantees
Reserved land management 	<ul style="list-style-type: none"> No provisions noted for reserved land At common law, reservations (e.g., national parks) do <i>not</i> necessarily extinguish Native Title 	<ul style="list-style-type: none"> Lands reserved for <i>any</i> purpose prior to Wk can continue to be used for that purpose Rights to compensation & minimal procedural rights allocated to Native Title holders re: management of national parks (i.e., notification & chance to comment) 	<ul style="list-style-type: none"> Significantly reduces STG incentives to negotiate with Native Title holders over managing national parks or forest reserves Minimal procedural rights & rights to compensation still exist




* See previous slides for translations of acronyms used throughout this chart

Source: Native Title Act 1993 (Cth); Native Title Amendment Act 1998 (Cth); see also Paul Burke *et al.* (for the Aboriginal & Torres Strait Islander Commission), *Detailed Analysis of the Native Title Amendment Act 1998*, Rev. ed., 1998, available at http://www.atisc.gov.au/issues/Land/Native_Title/detailed_analysis_of_the_native_...asp (summarized, edited, and supplemented by C. Scott López).

EXHIBIT 7

THE NATIVE TITLE AMENDMENT ACT 1998 (NTAA)* UPDATED THE ORIGINAL NATIVE TITLE ACT 1993 (NTA) IN 21 KEY AREAS, CONTINUED (3 of 6)

Legend:  Positive  No change  Negative

Key area / Issue	Under NTA	NTAA amended approach	Affect on Native Peoples
<div>9</div> <div>Public facilities & services</div>	<ul style="list-style-type: none">No provisions address this issue	<ul style="list-style-type: none">Construction, operation, use, maintenance, and repair of all public facilities allowed on Native Title lands, subject to (a) procedural rights equalisation, (c) the non-extinguishment (b) notification, (c) the non-extinguishment principle, (d) compensation, (e) reasonable access, and (f) protecting key sites	 <ul style="list-style-type: none">Could allow for the compulsory acquisition of Native Title for constructing new facilities if exclusive possession is requiredSome procedural guarantees in place to ensure publicity, as needed, of troubling STG initiatives
<div>10</div> <div>Freehold test & compulsory acquisition of Native Title rights</div>	<ul style="list-style-type: none">Freehold test established as key safeguard of Native Title (i.e., only if act can be done to Freehold can it be done to Native Title)Compulsory acquisition of Native Title possible <i>only</i> if compulsory acquisition Act provides for (a) just compensation and (b) opportunity to negotiate non-monetary compensation	<ul style="list-style-type: none">Expands Government acts which are exempt from Freehold test (e.g., water management, primary production, opal & gem mining)Ensures that compulsory acquisition completely extinguishes Native TitleAll non-Native Title coexisting interests are compulsorily acquired if Native Title interests are compulsorily acquiredSTG Aboriginal Heritage legislation required to validate Freehold testCompulsory acquisition of Native Title allowed automatically for select items (e.g., infrastructure projects, town/city intertidal zones, and mining tenements/facilities)	 <ul style="list-style-type: none">Effectively destroys all Freehold Test guarantees for Native Title holders
<div>11</div> <div>Compulsory Native Title Acquisition of Pastoral Leases (for Freehold Upgrades)</div>	<ul style="list-style-type: none">Commonwealth (Cth) government pays 75% compensation for Native Title on Pastoral LeasesRTN required for all other land actions (because would benefit 3rd parties)	<ul style="list-style-type: none">STGs can compulsorily acquire and extinguish Native Title on Pastoral Leases by upgrading leases unilaterally to Freehold (with 100% compensation)RTN extinguished for all STG lease upgrades, though procedural rights left intactActions against current Native Title holders must be approved by independent body	 <ul style="list-style-type: none">STGs granted extraordinary power, though may not use it given effective 25% land surcharge & publicity concernsRegistered Native Title holders—as opposed to new Native Title applicants—afforded greater protection because unilateral STG upgrades must be justified

* See previous slides for translations of acronyms used throughout this chart
Source: Native Title Act 1993 (Cth); Native Title Amendment Act 1998 (Cth); see also Paul Burke *et al.* (for the Aboriginal & Torres Strait Islander Commission), *Detailed Analysis of the Native Title Amendment Act 1998*, Rev. ed., 1998, available at http://www.aaisc.gov.au/issues/Land/Native_Title/detailed_analysis_of_the_native_act (summarized, edited, and supplemented by C. Scott López).

EXHIBIT 8

THE NATIVE TITLE AMENDMENT ACT 1998 (NTAA)* UPDATED THE ORIGINAL NATIVE TITLE ACT 1993 (NTA) IN 21 KEY AREAS, CONTINUED (4 of 6)

Legend:  Positive  No change  Negative

Key area / Issue	Under NTA	NTAA amended approach	Affect on Native Peoples
12 Off-shore areas	<ul style="list-style-type: none"> • Procedural rights for Native Title holders exist if the same is true for others • Mineral exploration and fishing licenses can be granted without negotiation 	<ul style="list-style-type: none"> • Compulsory acquisitions automatically extinguish Native Title and all procedural rights • Mineral exploration and fishing licenses can still be granted without negotiation 	<ul style="list-style-type: none"> • Native Title holders rights in off-shore areas significantly reduced—if not practically eliminated
13 Right to Negotiate (RTN)	<ul style="list-style-type: none"> • RTN exists for (a) any grant of an exploration or mining lease and (b) compulsory acquisition of Native Title rights for a 3rd party over any area where a claim can be registered 	<ul style="list-style-type: none"> • RTA eliminated (a) for mining infrastructure projects, (b) city/town lands, (c) alluvial gold and tin mining, and (d) opal and gem mining (subject to certain conditions) • STG Statutory schemes can replace RTN on pastoral leases, land reserved for the public or a particular purpose, national parks, and city/town lands • Some checks and balances retained, such as requirement to consult with representative bodies and achieving Ministerial approval of any STG schemes 	<ul style="list-style-type: none"> • Government no longer obliged to negotiate with Native Title holders in good faith • STGs given greater authority by Cth powers
14 Exploration Acts	<ul style="list-style-type: none"> • Only exploration acts that would minimally affect Native Title could be excepted from RTN 	<ul style="list-style-type: none"> • Broadens scope of acts minimally affecting Native Title lands (and are thus exempt from RTN) • Alternative consultation scheme introduced allowing independent parties to voice objections at public hearings, though with no obligation for decision makers to take these objections into account • Mining Lease renewals limited to same terms as original lease 	<ul style="list-style-type: none"> • Reduces the ability of Native Title holders to limit the extent of exploration acts on their land

* See previous slides for translations of acronyms used throughout this chart

Source: Native Title Act 1993 (Cth); Native Title Amendment Act 1998 (Cth); see also Paul Burke et al. (for the Aboriginal & Torres Strait Islander Commission), *Detailed Analysis of the Native Title Amendment Act 1998*, Rev. ed., 1998, available at http://www.atisc.gov.au/issues/Land/Native_Title/detailed_analysis_of_the_native_title.asp (summarized, edited, and supplemented by C. Scott López).

EXHIBIT 9

THE NATIVE TITLE AMENDMENT ACT 1998 (NTAA)* UPDATED THE ORIGINAL NATIVE TITLE ACT 1993 (NTA) IN 21 KEY AREAS, CONTINUED (5 of 6)






Key area / Issue	Under NTA	NTAA amended approach	Affect on Native Peoples
<div>15</div> <div>Access rights to Pastoral Lease Lands</div>	<ul style="list-style-type: none">No provisions address this issue	<ul style="list-style-type: none">Those requiring access rights must register and have had access rights at the time of the <i>W/k</i> decisionStatutory access limited to previous accessCommon law access rights suspended while interim access rights are exercised	<div></div> <ul style="list-style-type: none">Access effectively denied of all Native Peoples to Pastoral Lease Lands except by appeals to the Federal Court
<div>16</div> <div>Compensation</div>	<ul style="list-style-type: none">Just compensation required for all claims involving property acquisitionSimplified process for small claims (i.e., <A\$100,000)	<ul style="list-style-type: none">Small claims require explicit determination of Native Title	<div></div> <ul style="list-style-type: none">Complicates the compensation process, resulting in longer timeframes to process claims
<div>17</div> <div>Application process for Native Title recognition</div>	<ul style="list-style-type: none">All requirements noted in the Regulations (and not in the Act itself)	<ul style="list-style-type: none">Requirements iterated in the Act itself, with an added requirement of describing all Native Title activities to be conducted in the claim itself	<div></div> <ul style="list-style-type: none">Some additional resources will be required to complete the necessary requirements
<div>18</div> <div>Sunset clause & claims process</div>	<ul style="list-style-type: none">No time limits for claimsFederal Court must be fair, just, economical, informal, & promptCultural and customary concerns must be taken into account transcending technicalities, legal forms, and the rules of evidence	<ul style="list-style-type: none">No time limit for claims enactFederal Court is bound by the rules of evidence and legal processCultural concerns may be taken into account but not so as to unduly prejudice other parties	<div></div> <ul style="list-style-type: none">Increases the challenges of Native Peoples to adjudicate claimsFortunately maintains lack of time limit, removing pressure from Native Peoples to file claims by a certain deadline
<div>19</div> <div>Registration Tests</div>	<ul style="list-style-type: none">Claims must be registered "as soon as practicable" after filing (i.e., effectively automatically)	<ul style="list-style-type: none">Claims only registered after applicants meet series of key tests, including: (a) physical connect by at least one member of the claimant group, (b) >1 <i>prima facie</i> Native Title rights can be established, (c) factual basis provided for rights asserted, and (d) native title not extinguished	<div></div> <ul style="list-style-type: none">Slows down the registration process, though does not substantively alter the requirements for a grant of Native Title

* See previous slides for translations of acronyms used throughout this chart
Source: Native Title Act 1993 (Cth); Native Title Amendment Act 1998 (Cth); see also Paul Burke *et al.* (for the Aboriginal & Torres Strait Islander Commission), *Detailed Analysis of the Native Title Amendment Act 1998*, Rev. ed., 1998, available at http://www.atlsc.gov.au/issues/Land/Native_Title/detailed_analysis_of_the_native_act.asp (summarized, edited, and supplemented by C. Scott López).

EXHIBIT 10

THE NATIVE TITLE AMENDMENT ACT 1998 (NTAA)* UPDATED THE ORIGINAL NATIVE TITLE ACT 1993 (NTA) IN 21 KEY AREAS, CONTINUED (6 of 6)



Key area / Issue	Under NTA	NTAA amended approach	Affect on Native Peoples
<div>20</div> <div>Representative bodies</div>	<ul style="list-style-type: none">Representative bodies must be broadly representative and satisfactorily able to perform its functions (e.g., facilitating claims, resolving disputes, and representing Native Title holders)	<ul style="list-style-type: none">Wide array of new requirements and stipulations made for representative bodies, all of which will require re-recognition from the Minister for Immigration and Multicultural and Indigenous Affairs (MIMIA)	<ul style="list-style-type: none"> Complicates the process of establishing representative bodies, though with ultimately greater protections and assurances that Native Peoples' interests will be effectively and thoroughly upheld
<div>21</div> <div>Miscellaneous provisions</div>		<ul style="list-style-type: none">STG bodies granted tenure security no less favorable than that provided by the NNTTNNTT can dismiss applications where it determines it has no jurisdiction or the applicant fails to proceed	<ul style="list-style-type: none"> Little, if any, widespread effects
<div>Overall summary</div>	<ul style="list-style-type: none">Provided solid framework for recognizing Native Title Rights for Native Peoples, albeit with some ill-defined areas	<ul style="list-style-type: none">Significantly curtails and limits rights of Australian Native Peoples despite limited improvements of some processes and lip-service to minimal procedural guarantees	<ul style="list-style-type: none"> Significant setback to realizing fully the import of the principles and philosophy in <i>Mabo</i>

* See previous slides for translations of acronyms used throughout this chart
Source: Native Title Act 1993 (Cth); Native Title Amendment Act 1998 (Cth); see also Paul Burke *et al.* (for the Aboriginal & Torres Strait Islander Commission), *Detailed Analysis of the Native Title Amendment Act 1998*, Rev. ed., 1998, available at http://www.atisc.gov.au/issues/Land/Native_Title/detailed_analysis_of_the_native_.asp (summarized, edited, and supplemented by C. Scott López).

EXHIBIT 11

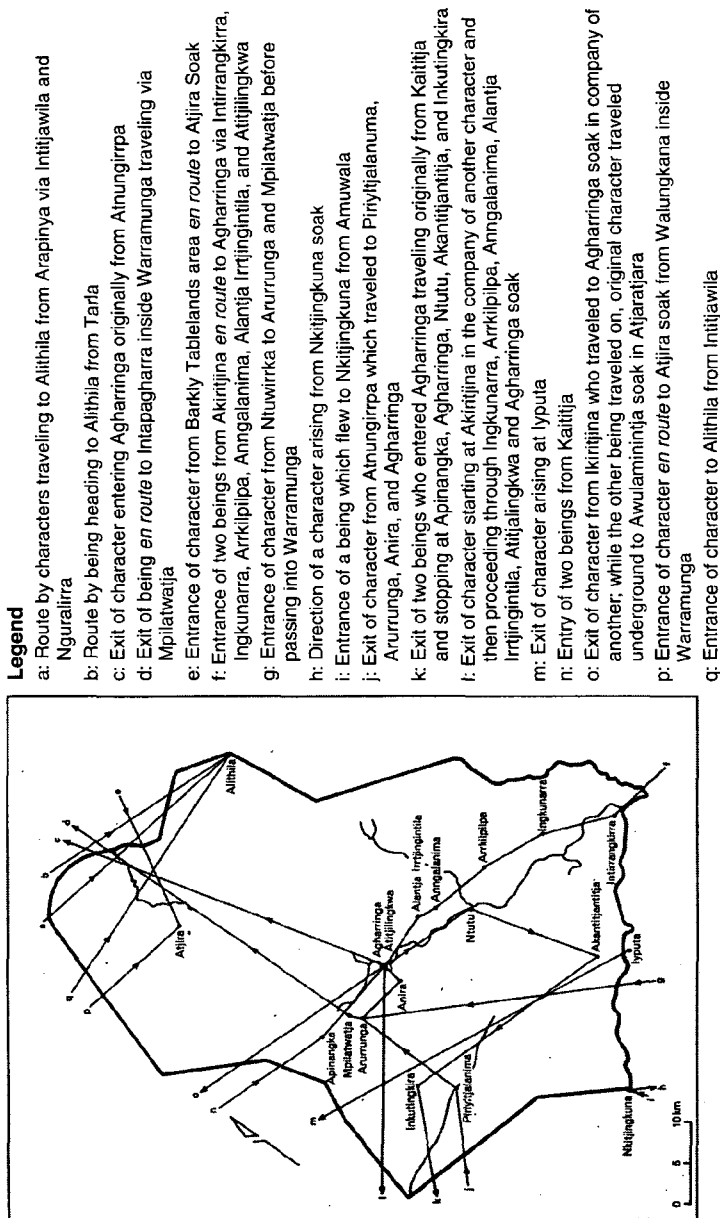
A NEW APPROACH INTEGRATING CONJOINT SOVEREIGNTY & MANDATED EASEMENTS WOULD
DRAMATICALLY IMPROVE THE CURRENT REGIME & MEET NATIVE PEOPLE'S INTERESTS

Current regime:		New approach:	
Key area	Native Title seen as <i>Fee Simple</i>	<i>Conjoint Sovereignty with Mandated Easements</i>	
① Sovereignty	<ul style="list-style-type: none">• One: Crown Sovereignty	<ul style="list-style-type: none">• Two conjointly <i>vis-à-vis</i> land: Crown Sovereignty and Native Sovereignty	
② Native Title	<ul style="list-style-type: none">• Recognized• Native Title effectively viewed as Fee Simple (<i>vis-à-vis</i> expunging all other claims)—and consequently rarely recognized	<ul style="list-style-type: none">• Recognized• Limited by Mandatory Easements for Pastoral Leases (and other special uses)—though widely recognized	
③ Problem / Conflict Management	<ul style="list-style-type: none">• Negotiation Rights (RTN) codified in NTA, though largely eliminated in NTAA• Negotiation viewed largely as impediment by non-Natives due to broad scope of Native Title	<ul style="list-style-type: none">• ADR methods (i.e., Negotiation, Mediation, and, if necessary, Arbitration) mandated for any clarifications of Mandated Easement or Land Management Practices• Joint requirement of non-Native and Native Peoples	
④ Lease management	<ul style="list-style-type: none">• Leases granted to individual lease holders with limited scope, which States can deem immune from Native Title Claims (e.g., Pastoral Leases)	<ul style="list-style-type: none">• Lease rights codified as mandated easements on Native Title Land	
⑤ Easements	<ul style="list-style-type: none">• None integrated into current scheme	<ul style="list-style-type: none">• Mandatorily issued on Native Title lands for Pastoral Leases (and other special uses), guaranteeing rights of current Lease Holders	
Summary	<ul style="list-style-type: none">• Recognizes Absolute Native Title, though fails to address inevitable erosion stemming from tensions with settled non-Aboriginals & need for "stability"• Imposes 'Western' conceptions in 'Native Title' formulation which are not synonymous with Aboriginal Peoples' Cultures and Traditions (e.g., Songlines and Dreamings)• Recognizes Aboriginal Sovereignty jointly with Crown Sovereignty, according Native Peoples the recognition they are due• Creates durable, long-term scheme of mandated easements to ensure security of pastoral lease holders and economic stability• Mandates negotiation, mediation, and arbitration in efforts to begin achieving more comprehensive reconciliation among all peoples		

Source: Analysis by C. Scott López.

EXHIBIT 12

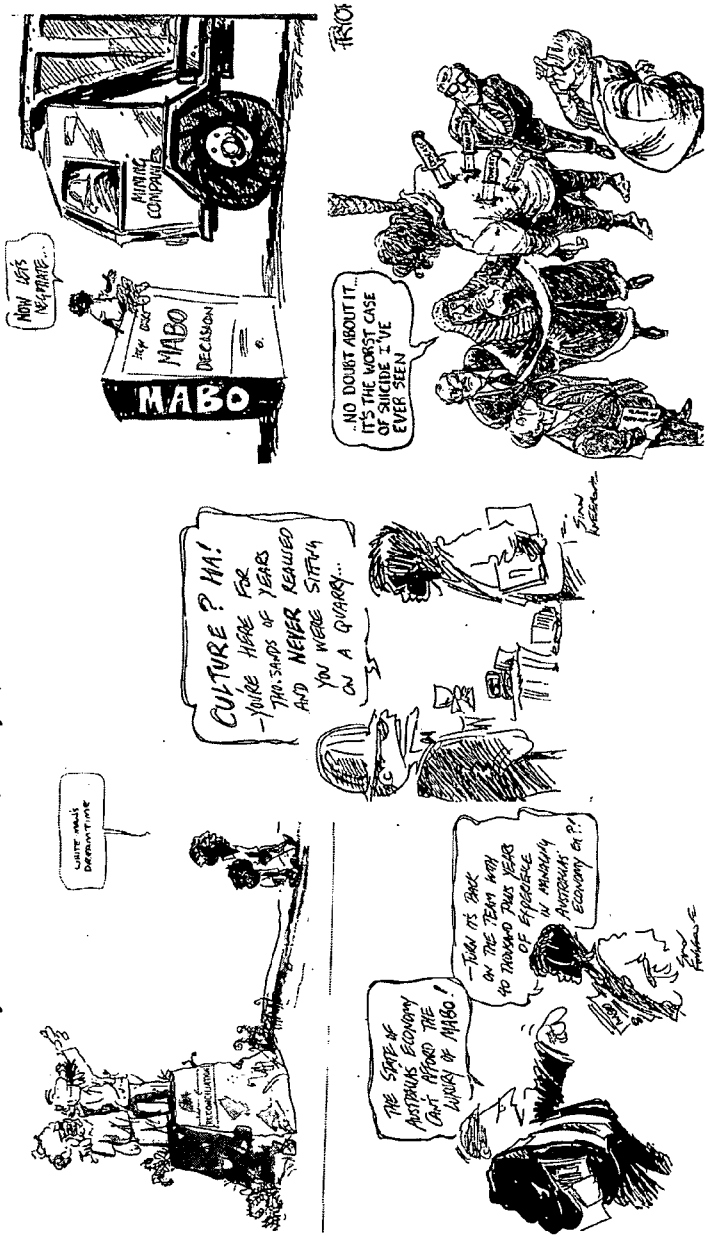
**THE COMPLEXITY OF OWNERSHIP RIGHTS DELINEATED BY SONGLINES AND DREAMINGS
CLEARLY ILLUSTRATES THE INADEQUACY OF RIGID NATIVE TITLE DELINEATIONS**
Example of Dreamings & Songlines inside Agharringa Country traveling to and from non-Alyawarra Territories



Source: Richard Moyle, *Songs, Ceremonies, and Sites: The Agharringa Case, in Aborigines, Land, and Land Rights* 66, 74 (Fig. 5) (Nicolas Peterson & Marcia Langton, eds., Canberra, Australian Institute of Aboriginal Studies, 1983), legend edited by C. Scott López.

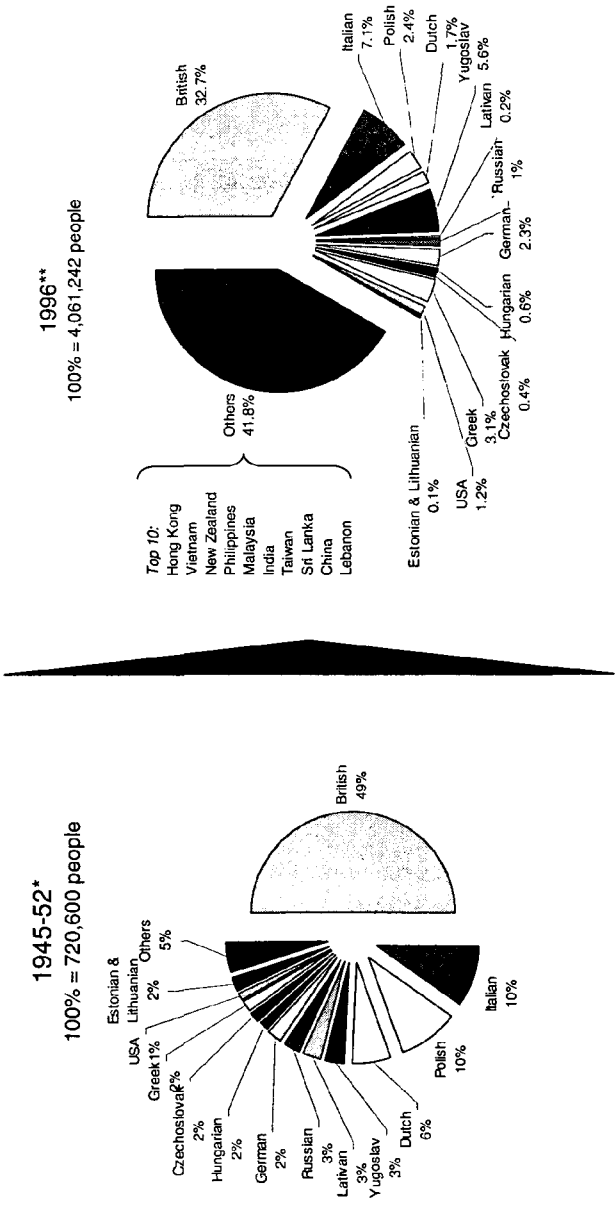
EXHIBIT 13

MABO'S HOPE WAS QUICKLY FOLLOWED BY WIDESPREAD, OFTEN JUSTIFIED CYNICISM THAT ITS BENEFITS WOULD NEVER BE FULLY REALIZED
Political cartoons by Simon Kneebone, C. Pryor, and A. Moir



Source: Mabo: A Sourcebook, 5th ed (Melbourne, Australia, Monash Information Service, 1995); H. McRae et al., Aboriginal Legal Issues 292 (North Ryde, NSW, Law Book Co., Ltd., 1991); A. Moir, Sydney Morning Herald, August 15, 1996, at 14; selected by C. Scott López.

AUSTRALIA HAS BECOME INCREDIBLY DIVERSE SINCE IT KICKED OFF A LARGE-SCALE IMMIGRATION PROGRAMME IN 1945



* Declared Nationality of Permanent New Arrivals, October, 1945 – December, 1952

** Non-Australian Born Population, Fiscal Year ending June, 1996

Source: W.V. Aughterson, *Taking Stock: Mid-Century Life in Australia*; Ian Burley, *Impact of Immigration on Australia*; Analysis by C. Scott López

EXHIBIT 15: NATIVE TITLE QUOTES

This is a fundamental test of our social goals and our national will: our ability to say to ourselves and the rest of the world that Australia is a first-rate social democracy The plight of Aboriginal Australians affects us all The starting point might be to recognize that the problem starts with non-Aboriginal Australians. It begins with that act of recognition.

Recognition that it was we who did the dispossessing.

We took the traditional lands and smashed the traditional way of life.

We brought the diseases . . .

We committed the murders.

We took the children from their mothers.

We practiced discrimination and exclusions.

It was our ignorance and our prejudice.

And our failure to imagine these things being done to us.

- Hon. Paul Keating, 24th Prime Minister of Australia (Dec., 1991-Mar., 1996) December 10, 1992^a

Australians of this generation should not be required to accept the guilt and blame for the past actions and policies over which they had no control.

I would like to . . . strike a fair and decent balance in this very difficult debate about . . . Native Title I think we all agree on one thing and that is the sooner we get this debate over and get the whole issue behind us, the better for all of us

The nub of the problem is that . . . the High Court of Australia significantly changed what had been the understanding of most people about the law

I don't believe that endless amendment and debate is going to produce more jobs, greater fairness, or greater certainty.

I believe that the time has come for us to fix this issue and to fix it now.

- Hon. John Howard, 25th Prime Minister of Australia (Mar., 1996-Present) May 27, 1997 & November 30, 1997^b

^a Paul Keating, Address at the International Year for the World's Indigenous Peoples celebration, (Dec. 10, 1992).

^b First sentence from: *Mr. Howard Unreconciled*, SYDNEY MORNING HERALD, May 27, 1997, at 1; see John Howard, Address on ABC Television Concerning the Wik decision and Native Title (Nov. 30, 1997); see also Daryl Williams, Attorney-General of

In the decade since the High Court dismissed the legal fiction of terra nullius in Mabo, it is painfully apparent that the process for determining Native Title is costly, slow, and unwieldy. . .

The Native Title process has . . . failed to deliver certainty to Indigenous People, many of whom are still waiting to reap the benefits they believed would flow from a recognition of their rights.

- Editorial, THE AGE—MELBOURNE

August 12, 2002^c

Australia, Address to the Native Title Conference 2002 in Geraldton, WA, entitled "Native Title: The Next 10 Years – Moving Forward by Agreement" (Sept. 4, 2002) (echoing Howard's comments after the passage of the NTAA and additional changes which need to be implemented).

^c Editorial, *A Better Way Needed on Native Title Claims*, THE AGE—MELBOURNE, Aug. 12, 2002, at 10, available at <http://www.theage.com.au/articles/2002/08/11/1028158045754.html> (last visited Oct. 31, 2003).